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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 30

JULIUS A. KRUG, DEPARTMENT OF INTERIOR, PETITIONER,

vs.

SHERIDAN-WYOMING COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1949.
CERTIORARI GRANTED OCTOBER 10, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 60

JULIUS A. KRUG, DEPARTMENT OF INTERIOR, PETITIONER,

vs.

SHERIDAN-WYOMING COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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"A"-"B" [Caption omitted]

1 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., MONARCH, WYOMING, PLAINTIFF,

vs.

JULIUS A. KRUG, DEPARTMENT OF THE INTERIOR, WASHINGTON, D. C., DEFENDANT.

Reporter's Transcript of Proceedings on Motion for Preliminary Injunction—Filed Dec. 8, 1947

Friday, November 14, 1947.
Washington, D. C.,

The above-entitled action came on for hearing on motion for application for preliminary injunction, before the Honorable Alexander Holtzoff, Associate Justice, at 11:30 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff: T. PETER ANSBERRY, ESQ., and STEPHEN J. MCMAHON, JR., ESQ.;

On behalf of the Defendant: RALPH S. BOYD, ESQ.

2 PROCEEDINGS

THE CLERK: Civil Action No. 4465-47, Sheridan-Wyoming Coal Company, Inc., *vs.* Julius A. Krug.

MR. ANSBERRY: If your Honor please, I represent the plaintiff, with Mr. McMahon. We are ready.

THE COURT: What is the matter which is before me?

ARGUMENT ON BEHALF OF PLAINTIFF

MR. ANSBERRY: If Your Honor please, this is an application for a preliminary injunction, a temporary restraining order having been issued November 4th, ex parte, by Mr. Chief Justice Laws. The temporary restraining order expires, by its terms, today.

The Sheridan-Wyoming Coal Company is a corporation incorporated under the laws of Delaware, with its mining operation headquarters at Monarch, Wyoming. It has held coal mining leases from the Federal Government for a number of years and presently holds a lease executed in 1943.

Some 14 years ago, in January of 1934, the Secretary of the Interior issued a certain regulation having, we contend, the force and effect of law, and issued certain letters having the force and effect of withdrawal of public lands from the public domain for certain public purposes.

This was a part of high economic policy of the executive and legislative departments of the government.

The regulation in question is Regulatio 193.3 of the Fed-
3 eral Code of regulations. It provides, in effect, that no additional coal lands will be—coal mines, rather, I should say—will be authorized unless there is a showing made of need for the coal from those mines which cannot otherwise reasonably be supplied.

The complaint alleges that there has been no finding by the Secretary of the Interior—

THE COURT (interposing): I think I can follow you better if you will tell me what sort of an injunction you are seeking.

MR. ANSBERRY: For a preliminary injunction against the issuance of a coal lease to our competitor, which we contend is prohibited by Regulation 193.3.

THE COURT: What does that regulation provide?

MR. ANSBERRY: Regulation 193.3:

> "Showing Required That An Additional Coal Mine Is Needed. The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met."

And it gives the conditions.

THE COURT: Is it your contention that the Secretary proposes to make a lease in violation of that?

MR. ANSBERRY: Yes, your Honor.

4 THE COURT: What is the plaintiff's interest in the matter?

MR. ANSBERRY: The plaintiff is, as I say, engaged in the production of this Monarch area coal in Wyoming and has been for the last 30 years, and has an investment in excess of a million dollars. And we contend, as a member of the class of existing coal mines, as distinguished from additional coal mines, it is protected by the regulation.

THE COURT: You do not claim any interest in the property, which the Secretary disregards?

MR. ANSBERRY: No.

THE COURT: You claim that you will be injured by the coming in of additional mines?

MR. ANSBERRY: Yes. And that it is entitled to the protection of the Government under the regulation which is expressed in regulation 193.3.

There are also two letters of Secretary Ickes when the regulation was issued, which further illuminate the policy which was adopted.

I read an excerpt from the letter of the Secretary of the Interior, of January 24, 1934, addressed to the Director of the Geological Survey:

> "The question of the advisability of withholding new leases of coal lands of the United States has been presented to me.
>
> "It is clear from the language of section 2 of the leasing act of February 25, 1920 (41 Stat. 437), and from the interpretation given to section 13 of that act, relating to oil and gas, by the Supreme Court in the case of *United States* v. *Wilbur* (283 U. S. 414), that it is within the discretionary authority of the Secretary of the Interior whether he shall issue any coal leases and coal prospecting permits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued."

THE COURT: Of course, that condition is changed.

MR. ANSBERRY: If your Honor please, the Secretary of the Interior, Mr. Krug, the defendant in this case, has already affirmed the policy of the regulation in this very case, but he says the regulation does not apply.

THE COURT: Of course, I think you have to establish a right to sue. What right have you to bring this suit, any more than any other citizen?

MR. ANSBERRY: We have a special interest as one of the class of existing coal mines, which was purported to be protected by this regulation.

THE COURT: I do not think that this regulation was adopted for the purpose of protecting existing coal mines or saving them from competition. I think it was to safeguard the natural resources of the United States.

MR. ANSBERRY: That is right, from the destruction that would ensue from the wasteful competition, where they were having to mine in an uneconomic manner in order to make ends meet. I am sure that the representative of the Secretary of the Interior will concede that there was a terrible condition at that time, which was unregulated.

THE COURT: Are you familiar with the case of Frothingham against Mellon, which held that an action may not be brought

against the head of a Federal department by a taxpayer or citizen to enjoin him from diverting Government property?

MR. ANSBERRY: Yes, sir, I am.

We rely upon the Chicago Junction case, Supreme Court of the United States, which was reported in 264 U. S. 258, an opinion by Mr. Justice Brandeis.

In that case, the Chicago Junction Railroad Company was about to be sold to the New York Central Railway. If the New York Central obtained it, it intended to exclude, and, in fact had already begun to exclude the Baltimore and Ohio Railroad from the use of that terminal.

Now, in that case, the Baltimore and Ohio sought an injunction against the Interstate Commerce Commission on the ground that there was no evidence whatever to support their finding that the public interest would be served by permitting the New York Central to monopolize the Chicago Junction, and that was admitted
7 in the pleadings of the Interstate Commerce Commission.

In the second part of the opinion, Mr. Justice Brandeis found that under the Interstate Commerce Act the Baltimore and Ohio Railroad had been granted a special interest as a competing railroad sufficient to give them standing to sue, saying:

> "But Transportation Act, 1920 repealed that provision in Section 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company."

That is Page 267 U. S. Reports.

Then Justice Brandeis gave a second ground, which we think is also applicable in this case, namely, the fact that the Interstate Commerce Commission had permitted the Baltimore and Ohio Railroad to file briefs in opposition before them, Mr. Justice Brandeis saying, at Page 268:

> "Moreover, the fact of intervention allowed as it was, implies a finding by the Commission that the plaintiffs have an interest."

In this case the briefs filed before the Department of
8 the Interior, I am told, on behalf of our clients and other protestants to the lease to the Big Horn Coal Company are about four feet high. So our standing to sue has never been questioned before the Department of the Interior, and it comes as

somewhat of a surprise to us to have it challenged here, if your Honor please.

We feel, just as the Baltimore and Ohio Railroad Company in the Chicago Junction case was one of a class protected by a statute, so we are a class protected by a regulation, and, therefore, have a special interest and not the mere standing of an individual, as in the Frothingham case and in the Alabama Power case.

Moreover, we are a Federal lessee now, which the Big Horn Coal Company is not. And this regulation was in force at the time our lease was issued, and we believe that regulation, which would afford us substantial protection, became a part of our lease, the same as any law in the jurisdiction becomes a part of the lease in the jurisdiction in which the lease is issued.

MR. MCMAHON: If your Honor please, I have another point on this which I would like to present.

Even were all of these factors not present—first, the factor of our general interest in the matter being within the protected class; secondly our special interest in view of this particular regulation; third, our interest as a matter of law, in which this
9 terminology of law was a part of the law—we have a fourth point, under which the Supreme Court, in a similar situation, said that even where a company relies and has to rely upon an interpretation of a department or of a governmental head for a number of years, and even though that interpretation might be wrong, nonetheless that mere reliance, where it affects their business, is enough to establish standing to sue. That was in the Oleomargarine case.

MR. ANSBERRY: At this point, your Honor—

THE COURT (interposing): I can only hear one counsel at a time.

MR. ANSBERRY: I would like to raise the point at this time that this injunction was served upon the defendant through his solicitor on November 4th, and that no reply, no points and authorities, nothing was filed in answer until November 13th, and that, under Rule 7-B of the rules of this Court, a motion for preliminary injunction may, if your Honor feels it should be, be taken as conceded—

THE COURT (interposing): No. I wouldn't grant a preliminary injunction by default on any such ground as that. I would not deprive any party of his day in court.

MR. ANSBERRY: I appreciate that. However, if your Honor please, we have had only one day in which to examine the pleadings in the form of a memorandum of points and authorities
10 filed by the defendant.

THE COURT: Have you filed any papers in opposition?

MR. BOYD: Yes, your Honor.

THE COURT: When did you file them?

MR. BOYD: The day before yesterday.

MR. ANSBERRY: I think the filing date is November 13th.

THE COURT: I think you should have filed earlier.

MR. BOYD: We got them from the Department of the Interior only late last Friday.

THE COURT: I am not interested in any delays on the part of the Department of the Interior.

MR. BOYD: We did not know there was such a case until—

THE COURT (interposing): I am not criticizing you personally, of course. But I think the Government is bound by the same rules as other litigants.

MR. BOYD: There is no doubt of that.

THE COURT: I think your client was very dilatory in not informing you earlier.

MR. ANSBERRY: As a matter of courtesy, we did serve the Attorney General with the pleadings on November 5th.

THE COURT: Well, I never let any matter go off on such a point.

MR. ANSBERRY: What we would prefer to do would be to have an opportunity to get our points and authorities, which we have in mere draft form—our points in reply to their points—in
11 better shape.

THE COURT: There is no provision under the rules of this Court for filing reply to points and authorities.

MR. ANSBERRY: They filed a motion to dismiss our complaint.

THE COURT: If you object, I will not hear the motion to dismiss the complaint today. I am going to hear and dispose of the motion for a preliminary injunction. You are entitled to time to answer the defendant. The only thing before me is the motion for a preliminary injunction. That is your motion.

MR. ANSBERRY: Yes. Of course, the papers filed yesterday by the Department of Justice would go both to the motion for a preliminary injunction and to the motion to dismiss the complaint, if your Honor please, and, for that reason, we are somewhat handicapped in presenting it to your Honor in the manner in which we would like to, with our citations in the proper form and quotations properly excerpted.

THE COURT: You may proceed.

MR. ANSBERRY: If your Honor please, I would request permission at this time to file an affidavit which covers certain facts that we believe are pertinent to the emergent nature of our request.

THE COURT: You may file the affidavit.

12 MR. ANSBERRY: It has been served on the Government.

THE COURT: It may be filed.

(The affidavit above referred to was filed with the Court.)

THE COURT: Wherein do you claim that the Secretary of the Interior is violating the regulation? Wherein does the violation appear?

MR. ANSBERRY: In consists in that he has not found either that the Big Horn Coal Company was an old mine, which would take it out of the regulation entirely, and which finding we contend would be absurd since they began operations in 1944 and the regulation was in effect in 1934. He has not made a finding that it was an old mine, as we have alleged in the complaint; and he has not made any finding that there has been an affirmative showing of need for the production of this mine.

We have prepared as a part of this, certain graphs which are referred to in our affidavit, which prove, in our mind, conclusively that there is no need for the production of this mine.

But the point we make is that the Secretary of the Interior has not made the finding requisite under the regulation, namely, that there is a need which cannot otherwise be reasonably supplied for the production of the Big Horn Coal Company. This coal is of
a very low grade bituminous character which will not
13 stand storage, and on account of its high water content, will not stand shipment over long distances, and therefore, is not available for the trade to alleviate the shortage in the trade for which there is need.

THE COURT: I am reading the regulation on which you rely. I do not find in it any provision that the Secretary of the Interior will not make a lease except on the basis of such findings as you recite.

MR. ANSBERRY: "The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met."

THE COURT: But is there a regulation that the Secretary of the Interior will not make a lease except on favorable recommendation of the General Land Office?

Suppose the Secretary of the Interior didn't consider the recommendation of the Land Office?

MR. MCMAHON: Your Honor, under those regulations, which I have not had an opportunity to read completely, but the general purport is that the Secretary acts through his subordinates down the line, and they act through him, and it is all departmental policy, though the final authority is his.

14 THE COURT: The usual practice of Government departments is for the head of the department to act for the subordinates.

Suppose the Secretary of the Interior took it upon himself, without asking any recommendation of the General Land Office, to make such a lease. Is there any law which would prevent that? Would he be exceeding his authority?

MR. ANSBERRY: The Secretary of the Interior has never before departed from Regulation 193.3 by his own decision apart from his subordinates, and he does not purport to do so now. In the very decision of which we complain, the denial of our motion for supervisory authority, he has stated again that Regulation 193.3 represents a sound policy and that he is in agreement with it. He simply takes the view that the Big Horn being an existing coal mine now and a big mine, is not an additional mine within the meaning of the regulation.

However, reading the letters of Secretary Ickes together with the regulation which was issued in pursuance of those letters, we feel that that is an untenable interpretation of the statute expressed in this regulation, because, if your Honor please, under the Mineral Lease Act the Secretary has authority to issue regulations for the control of the leasing and those regulations have been interpreted to grant this statutory authority to issue regulations is a delegation of power and having the force and effect of a
15 statute if not inconsistent therewith.

If we are to assume that by direction of the General Land Office the Secretary did not mean to bind himself to follow the policy he laid down for them, then I think we are getting into a government of men and not of laws. If he is entitled to depart from his established policy in a single case, for reasons unknown to anyone but himself, I feel that we are being denied the equal protection of the law.

THE COURT: A government official has always a right to depart from a policy. He has no right to depart from law.

Mr. ANSBERRY: A regulation, if your Honor please, which we contend has the force and effect of law.

Mr. MCMAHON: On that point, your Honor, as to the general policy which lies behind this regulation having the force and effect of a statute, it ties in with a great, broad, general rule of law which applies only to land cases. Because of the proprietory interest that the Congress has maintained, it has been held that the Secretary of the Interior can exercise that withdrawal of power very informally, just as long as it affects some great, broad, general policy, as it does in this case.

That relates to whether or not these particular letters, to which we referred before, of Secretary Ickes, are, in effect, withdrawal orders of the type discussed in the *Midwest Oil Company* vs. *The United States*, which is a long discussion of this historic with-
16 drawal power and raises many deep and considerably favor-

able points of law upon our particular side of the case, and I just wanted to refer to that, sir.

THE COURT: Very well.

ARGUMENT ON BEHALF OF DEFENDANT

Mr. BOYD: If the Court please, at the outset, I would like to correct two matters of fact that have been stated.

First, the Big Horn Coal Company is not coming in as a new competitor. The Big Horn Coal Company is now operating and has operated in this field for many years.

Mr. ANSBERRY: Since 1944.

THE COURT: I will hear one counsel at a time.

Mr. BOYD: It is an operating, existing mine on state lands at this very moment, and expects only to extend its operations when it receives a lease from the Government.

Secondly, it has been said that the Sheridan-Wyoming Coal Company received its Federal lease when the regulation upon which plaintiffs rely was in force. First, that is incorrect. And, secondly, it is not pleaded.

THE COURT: You say it is not pleaded?

Mr. BOYD: The plaintiff is relying on it.

THE COURT: Well, that is a very technical point.

Mr. BOYD: Well, I don't think it matters.

THE COURT: Let us not talk about things that do not matter. Let us talk about things that do matter. Let us get to the merits.

17 Mr. BOYD: It is the position of the Government, first, that the action of the Secretary in deciding to grant the lease was entirely proper and not in violation of any statute or regulation or anything else. It was a proper exercise of his powers.

Secondly, as your Honor has pointed out, the plaintiff has no standing to sue even if his action were improper.

Thirdly, it is the position of the Government that the Secretary's action in connection with the granting of leases is entirely discretionary and not subject to judicial review.

And fourthly, it is our position that the action cannot be maintained for want of indispensable parties.

THE COURT: I am not impressed by the last point. It has been held time and time again that an action to enjoin a government officer against exceeding his authority is not a suit against the United States.

Mr. BOYD: I believe there are variations on that rule which can be pointed out. It is no cause of action here even if there were something wrong, which we deny. The plaintiffs have no standing to complain of. As your Honor has observed, the regulation is simply a direction to the General Land Office as to what it is to do in con-

nection with making recommendations about the granting of coal leases. It is nothing but an administrative direction by the Secretary to his subordinate officials about what they are to consider
18 when they make recommendations to him with respect to the granting of coal leases. There is no suggestion in that regulation that the Secretary is bound by any kind of a recommendation, whether favorable or unfavorable.

He simply tells the Land Office that unless a certain condition exists it is not to make a favorable recommendation. But if it were to make a favorable recommendation, the Secretary could still refuse to grant the lease. If it were to make an unfavorable recommendation, he still will have his own hands free to decide as his decision may dictate on the facts of the whole case.

We submit that the Secretary cannot abdicate or throw away the discretionary powers which Congress has vested in him.

THE COURT: What is the statutory authority for making these leases?

Mr. BOYD: The Mineral Lease Act of 1920.

THE COURT: The specific provision?

Mr. BOYD: I do not have a copy of the statute with me, your Honor.

THE COURT: Very well. Proceed.

Mr. MCMAHON: I believe it is Section 189 of Title 30, your Honor.

THE COURT: Of the Code?

Mr. BOYD: Of the United States Code. It deals with
19 non-metallic minerals. Several sections take up oil and gas, coal, phosphates, and so on. In substance, they are all similar and the provisions having to do with the oil and gas leasing have been to the Supreme Court of the United States in *U. S.* vs. *Wilbur*, 283 U. S., Page 414.

That was an action to compel the Secretary to grant a lease and the Court held that the Secretary's powers under this statute were entirely discretionary, that he could not be compelled to grant one. By the same token, he cannot be restrained from granting one unless the plaintiff shows some interest in himself and some legal right which will be violated by the action of the Secretary in granting the lease.

This plaintiff has no legal right to have the Secretary not issue this lease to its competitor. The competition which will damage it is entirely lawful. There is no suggestion by the plaintiff that the competition is not lawful.

The case is on all fours with the *Alabama Power Company* vs. *Ickes*, 302 U. S., at Page 464, where the Secretary, in his capacity as Public Works Administrator, was proposing to make loans and grants——

THE COURT (interposing): I recall the case.

Mr. BOYD: The Supreme Court held that competition gave the plaintiff no standing to sue. The plaintiff has said that they rely upon the Chicago Junction case. The Chicago Junction case is distinguished by the Supreme Court from the Alabama Power
20 case, and it is there pointed out by the Supreme Court that the Chicago Junction case turned on the proposition that by virtue of the Transportation Act, the plaintiff had a statutory right to come into court. No such right is claimed here, and none can be.

There is no suggestion that the granting of this lease to the Big Horn Coal Company will violate any legal right of the plaintiff. The only suggestion is that the plaintiff will be damaged in consequence of the competition of the Big Horn Coal Company.

To go back one minute to the regulation, we submit that it is a mere declaration of policy.

THE COURT: You made that point before.

Mr. BOYD: I wanted to bring out the distinction between the declaration of policy and a regulation controlling private rights.

THE COURT: What is the section of the Code relied upon here?

Mr. ANSBERRY: I believe it is 201.

Mr. MCMAHON: The regulatory section is 189.

THE COURT: I am referring to the section authorizing the Secretary to make such leases.

Mr. BOYD: That is 201.

THE COURT: You may proceed. Do you have anything further, Mr. Boyd?

21 MR. BOYD: Yes, your Honor.

Finally, on the question of parties, another Supreme Court decision is, we submit, conclusive—Brady against Work (263 U. S. 435).

In that case a bill in equity was filed in this court, brought against the Secretary of the Interior and the Commissioner of the General Land Office to enjoin them from issuing a patent to a woman named Harner. Reading from the case:

"The bill avers that the register—

THE COURT (interposing): Do not read from the case. Summarize it briefly.

MR. BOYD: This is summarized in the opinion better than I can do it.

THE COURT: Well, all right. I do not like to have long excerpts read.

MR. BOYD: This is very short.

"The bill avers that the register and receiver, as well as the Commissioner of the Land Office and the Secretary of the Interior, violated the provisions of the Act of May 14, 1880, entitled 'An Act for the relief of settlers on public lands' (21 Stat. 140, c. 89), and

were without authority in deciding in favor of Lillie S. Harner and proposing to issue a patent to her."

Then, skipping:

22 "Lillie S. Harner is the person whom the administrative officers of the Government have held to be entitled to a patent for this land. Clearly the controversy between the plaintiff and those officers involving the granting of a patent to her can not be settled without her presence in court. She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party."

THE COURT: As I follow your quotation, I do not think that case is in point on the question of indispensable parties.

In that case the party claimed to have a legal right to the patent. The Big Horn Coal Company does not claim any legal right. They are asking the Secretary to grant them a lease, in the exercise of his discretion. So I do not think they are an indispensable party.

MR. BOYD: We cannot foresee what the claims of the Big Horn Coal Company will be.

THE COURT: Your position is that the Secretary is making this lease in the exercise of his discretion and not because the Big Horn Coal Company has acquired a right to a patent to the property.

That being so, in my opinion, the Big Horn Coal Company is not an indispensable party, and, for the reason I indicated a few moments ago, I do not think the United States of America is an indispensable party.

23 MR. BOYD: I do not know what the claims of the Big Horn Coal Company will be and we are called upon here to decide, in its absence, that it has no right to a lease.

If this Court should enter an injunction against the Secretary forbidding the granting of a lease and the Big Horn Coal Company should come in tomorrow and sue the Secretary to compel the granting of a lease, we would be in the position of telling them, "You are right, but——"

THE COURT (interposing): The Big Horn Coal Company has applied for a lease and the Secretary has indicated that he will grant the application?

MR. BOYD: That is right.

THE COURT: And this is a motion to enjoin him from carrying out his intention?

MR. BOYD: That is correct.

THE COURT: Your position is that the application of the Big Horn Company was for a lease to be granted in the discretion of the Secretary?

MR. BOYD: That is correct. But the Big Horn Company may take the position that they are entitled to it as a right, and we submit

that the Big Horn Coal Company is entitled to be heard on the question.

THE COURT: Do not fritter away your time on points that do not impress the Court. You have better points than that.

24 MR. BOYD: I believe I have made the points. We submit that the application for the preliminary injunction should be denied.

CLOSING ARGUMENT ON BEHALF OF PLAINTIFF

THE COURT: Does the plaintiff wish to reply?

MR. ANSBERRY: Yes, your Honor.

If your Honor please, you have made the point which I was going to make on the indispensable party.

THE COURT: You do not need to waste time on that.

MR. ANSBERRY: In U. S. against Midwest Oil Company——

THE COURT (interposing): You do not need to consume any time on that point. In my opinion, the point of legality of indispensable parties is not well taken.

MR. ANSBERRY: I direct your Honor's attention, on the point of this regulation, to 30 U. S. Code, Section 189, which specifically empowers the Secretary to limit his broad general power to issue leases by regulation. Those have been held, in Hodgson against Midwest Oil Company, to have the force of law.

THE COURT: I do not find any provision in that section authorizing the Secretary to limit his authority. All that provides is that the Secretary is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry the regulation into effect.

MR. ANSBERRY: In Hodgson against Midwest Oil Company, a man who claimed that he was a prior claimant under exploration
25 provisions of the Act, stated that he had received no notice that a lease was about to be issued by the Secretary to a subsequent explorer and that thereby he had been deprived of due process of law. And he pointed to the fact that the statute does not provide, or did not provide at that time, at any rate, for notice being given to prior claimants in any way whatever.

The statute was upheld by the court, though, in the Hodgson case on the ground that the Secretary had issued a regulation requiring the publication of 30 days' notice in the local paper to all possible claimants before issuing a lease, and the constitutionality of the Lease Act was upheld on the ground that that regulation of the Secretary had the force of a statute, and, therefore, shored up the statute and made it constitutional, which it would not have been otherwise.

(10) That the Undersecretary of the Interior and other agents of the defendant have refused to agree not to issue the questioned leases pending full hearing, if plaintiff were to consent to removal of the temporary restraint pending full hearing; and that the said agents of defendant have indicated they were about to issue the questioned leases the same evening that this court issue its temporary restraining order by its Chief Justice.

(11) That the plaintiff has obtained service of the defendant within this jurisdiction and is unable to obtain jurisdiction of him outside of the District of Columbia.

(12) That plaintiff would be unable to obtain jurisdiction of the Big Horn Coal Company within the District of Columbia except by voluntary appearance of Big Horn after the defendant issued it the questioned leases, because the Big Horn Coal Company is incorporated in Wyoming, maintains no office in the District of Columbia, and on information and belief has no agent for the service of process here. After issuance of the leases the defendant would probably claim and assert that the Big Horn Coal Company was a necessary party inasmuch as he already claims and asserts such even before the Big Horn Coal Company has any legally enforceable interest whatsoever.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated November 14, 1947.

Sworn to and subscribed before me this 14th day of November, 1947. Robert Fribush, Notary Public.

(Exhibit "F" omitted at this point as it is appended to the amended complaint as Exhibit "K".)

Service of a copy acknowledged 11:02 A. M., November 14, 1947.
RALPH S. BOYD.

80 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

Findings of Fact and Conclusions of Law

Filed Nov. 17, 1947

This action came on for hearing on plaintiff's motion for a preliminary injunction. The only pleading before the Court for con-

So that if the regulation may have that force in favor of the Secretary, we feel that it should have equal force in opposition to the Secretary.

THE COURT: To what case are you referring?

MR. ANSBERRY: Hodgson vs. Midwest Oil Company, if your Honor please.

THE COURT: Where is that reported?

MR. ANSBERRY: 273 f. 293.

THE COURT: What court decided that?

26 MR. ANSBERRY: A United States District Court; but it is cited in many other cases. It is a leading case on the effect of these regulations.

THE COURT: Was the particular regulation involved in this case involved in that?

MR. ANSBERRY: No.

THE COURT: I do not think you need argue that. The Court agrees with you that the Secretary of the Interior has a right to issue regulations under this act and those may have the force of law.

MR. ANSBERRY: Now then, that he did in this case issue a regulation having the force of law, we believe is demonstrated by the fact that the opening language of this regulation is, "Showing Required That An Additional Coal Mine Is Needed." The language of the head note, particularly, is not directed to the General Land Office, and the Secretary has never treated this before as anything which he could disregard, and he did not state in his later opinion that he is disregarding it here. He says that it does not apply here —that the language does not apply. And we are asking your Honor to interpret the language of the regulation; in effect, the Secretary has said, "It does not apply. If it did, I would deny the lease."

That is in the motion for exercise of supervisory authority, and there has been no attempt at repealing this. It has been
27 reaffirmed two or three or four times in the last few years, as Government counsel, I think, will admit. The regulation has always been treated as giving a litigant within the Department of the Interior a right to protest, and we have been protesting for a year and a half. Now, for the first time, yesterday, we learn that the defendant takes the position that what he tells his subordinates to do is one thing, and what he wants to do is something else, which is a position that has not been taken before.

There has always been an effort on the part of the Department to avoid by distinction this regulation, rather than that he has a right to disregard it.

So, in the Chicago Junction case, on which we rely, Mr. Boyd has referred to the Alabama Power case, and in that very case the Chicago Junction case was approved and distinguished by Mr.

Justice Sutherland, who, incidentally, was a dissenter in the Chicago Junction case against Mr. Justice Brandeis.

The Chicago Junction case is on the principle of freedom from a certain type of competition, you have standing to sue; whereas the Alabama Power Company case stands merely for the principle that the Alabama Power Company did not want the Government to loan money to the municipal power plants. But the Alabama Power Company had exclusive franchises, and there was specific authority for municipalities to engage in the power busi-
28 ness.

The case is entirely different from the one here, where we have a regulation which we say has the force of a statute. The Secretary could satisfy the statute, if the facts were justified, by finding that there was need for this coal mine. But he has never made such a finding in a couple of hearings and a rehearing for——

THE COURT (interposing): You have been over that, I believe. I do not think you need to repeat what you have said. Have you anything additional?

MR. MCMAHON: Your Honor, I had one other point besides the Mineral Lease Act, and also the point of standing to sue, and that is the additional point that there is another statute involved here, Section 141 of Title 43, which is the withdrawal authority of the President, which can be exercised very informally by the Secretary of the Interior; and those refer, not to the regulation, but to those two letters which the Secretary of the Interior wrote. And there are cases which hold that the Secretary does not even have to put his finding in writing which withdraws the public lands from public domain and leases cannot be issued upon them under their terms. Section 141 of Title 43 is most important.

And the Supreme Court has held that even without that particular statute and before it was enacted in this Midwest Oil case, the Secretary could, and the President, in matters involving broad
29 general policy, and in our case it is economic policy, and in the other case it was also broad economic policy—that he could do a thing like that—withdraw them absolutely, as a matter of law.

We have a third statute involved. That is the Federal Procedure Act of 1936, Sections 1002 and 1003.

It has been argued here that the language of this particular regulation is mere internal regulation of the Department. If this were so, they would not be required to publish it. Under the Administrative Procedure Act they are required to publish. It is our point that it means absolutely nothing, if the Government is right, that they can do that.

MR. ANSBERRY: We would like to offer in evidence a graph which is referred to in our affidavit and which shows the long term down

trend in the production of the Sheridan area coal because of lack of demand for it.

THE COURT: You may offer it, and it may be received as a part of the affidavit.

MR. ANSBERRY: If your Honor will examine that, you will see that we have drawn a line through the peacetime peaks of production in the Sheridan area.

THE COURT: I am willing to make it a part of the record, but I do not think that is of any importance as to whether or not there is a need or not a need for this capacity of this additional mine.

30 Mr. MCMAHON: There was also submitted one other point to show the cutting in effect in equity upon our markets in the West.

Mr. ANSBERRY: I think that is probably pretty much conceded.

THE COURT: I think I have heard enough.

Mr. ANSBERRY: I have one other important point, in the case of Brady against Work, from the standpoint that if your Honor should fail to grant us a preliminary injunction or some other form of temporary restraint and the lease were issued, there is no question but that the Big Horn Company would at that point become an indispensable party, and we would be left without a formal disposition on that point, in the event that the preliminary injunction is not granted.

THE COURT: I do not think I will consider that.

Mr. MCMAHON: Just one more point.

THE COURT: I had only suggested that I would hear counsel in reply to the Government.

Mr. MCMAHON: It will take just one moment.

Every point covered by opposing counsel actually goes to their motion to dismiss, which is coming on in a short while.

THE COURT: No. The discretion on these points is proper to be considered in this motion.

Mr. MCMAHON: We have had only one day to answer the
31 defendant's motion. Therefore, the office, as I understand it, of a preliminary injunction, particularly where they are coming in on a motion to dismiss, is whether or not we have made out a prima facie case and are entitled to temporary protection until we can get a full hearing.

RULING OF THE COURT

THE COURT: The Secretary of the Interior proposes to issue a coal mining lease to the Big Horn Coal Company under the provision of the Mineral Lease Act, Title 30 of the Code, Section 201.

The plaintiff, Sheridan-Wyoming Coal Company, Inc., a competitor of the Big Horn Coal Company, moves for a preliminary injunction to restrain the Secretary of the Interior from executing

the lease, on the ground that the making of such a lease is prohibited by a regulation of the Interior Department.

We are confronted, at the outset, with the question of whether the plaintiff has a standing to sue and to ask for such an injunction. The plaintiff has a lease on other mineral lands and is now seeking to prevent competition that will ensue by the granting of the lease to the Big Horn Coal Company.

It is the view of this Court that the plaintiff has no standing to sue. The plaintiff has no legal right to be protected from competition. His lease contains no provision that no other leases should be granted in any particular area to any other
32 concern engaged in the same business.

The position of the plaintiff legally is no different from that of any other citizen or taxpayer. It was well established by a line of cases, commencing with Frothingham against Mellon, that no taxpayer's suit lies against the United States or against a Government officer to restrain him for improperly or illegally disposing of Government property.

On the merits, in my opinion, there is no showing—no substantial showing—that the Secretary of the Interior is violating the law or any regulation that has the force of law. It is true, as counsel for the plaintiff contends, that the Secretary of the Interior is empowered to issue regulations under the Mineral Lease Act which would have the effect of law. The Court finds no regulation, however, which would prevent the Secretary from granting the lease herein requested.

The regulation relied upon is a provision which is, in its phraseology, an instruction to the General Land Office as to the circumstances under which it may make favorable recommendations for segregating lease units.

It is not a statutory limitation, and does not purport to be, of the power of the Secretary of the Interior to grant leases. The statutory power of the Secretary is plenary and involves broad discretionary power on his part to grant or withhold leases
33 in the exercise of his own judgment.

The Court is unable to find that the regulation on which the plaintiff relies in any way limits that authority.

Finally, it appears that the Secretary of the Interior has held that the regulation, if it is one, does not apply to the proposed lease here in question.

It is well settled that where there is an ambiguity in a statute or regulation involving or relating to the activities of a Government department, the construction of the head of the department on that statute or regulation will be accorded great weight by the courts and will be followed and accepted unless found to be palpably

erroneous. The construction appears to the Court to be very reasonable.

What the Court is really asked to do is to substitute its own judgment for the judgment of the Secretary of the Interior as to whether it is wise to grant the proposed lease. This the Court may not do.

For the reasons stated, the Court is of the opinion that no showing is made that the plaintiff is likely to fail at trial and, for that reason, it would be inappropriate to grant the preliminary injunction.

Motion denied.

Mr. ANSBERRY: Will your Honor grant an injunction pending appeal?

34 THE COURT: No.

Mr. ANSBERRY: Or a temporary restraining order pending appeal, to give us a chance to get over to the Court of Appeals?

THE COURT: No. I think you should apply for a stay pending appeal. I am not going to grant a temporary restraining order.

Mr. MCMAHON: It is a matter of time to get it over there, your Honor.

THE COURT: When will you make your application for appeal?

Mr. MCMAHON: This afternoon.

THE COURT: Mr. Boyd, will you agree not to have this lease signed until the plaintiff has an opportunity to apply to the Court of Appeals for a stay pending appeal?

Mr. BOYD: Until a definite time?

THE COURT: Until Tuesday morning.

Mr. ANSBERRY: Your Honor will grant a restraint until Tuesday morning?

THE COURT: I will grant until 4:00 o'clock Tuesday afternoon. I shall grant no further stay because I am denying application for stay pending appeal. But I think you should have an opportunity to make your application.

Mr. MCMAHON: We have a temporary restraining order until Tuesday?

35 Mr. BOYD: As I understand it, the existing temporary restraining order is dissolved.

THE COURT: No. I will continue it until Tuesday at 4:00 o'clock.

(Thereupon, at 12:30 o'clock p. m., the hearing was concluded.)

Reporter's certificate to foregoing transcript omitted in printing.

36 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 4465-'47

SHERIDAN-WYOMING COAL COMPANY, INC., Monarch, Wyoming,
PLAINTIFF

v.

JULIUS A. KRUG, Department of Interior, Washington, D. C.,
DEFENDANT

COMPLAINT FOR AN INJUNCTION—Filed Nov. 4, 1947

The plaintiff for its complaint herein states to this Honorable Court as follows:

First. The Sheridan-Wyoming Coal Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Monarch, Wyoming. It is engaged in the mining and distribution of sub-bituminous low grade coal in the markets of some twelve western states, to-wit, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri.

Second. The defendant is the duly qualified Secretary of the Interior of the United States, holding unto himself certain powers, duties and trusts thereunder and only by virtue of his office thereunder.

Third. This case arises under and by virtue of the laws of the United States, including the Act of June 11, 1946, 5 U. S. C. 1002, the Act of February 25, 1920, 30 U. S. C. 189, 201 et seq., and the Act of June 25, 1910, 43 U. S. C. 141 and regulations issued thereunder, more particularly Sec. 193.3 of Title 43, Federal Code
37 of Regulations. The amount in controversy exceeds $3000, exclusive of interest and costs.

Fourth. On January 24, 1934, the defendant's predecessor in office caused to be issued certain directive orders in letter form having the force and effect of statute, effectively withdrawing all public coal lands for coal leasing purposes except that certain public coal land for which could be shown an actual need which could not otherwise be reasonably met. Excerpted copy attached hereto and made a part hereof marked Exhibit A and Exhibit B.

Fifth. On January 6, 1944, one, the Big Horn Construction Company assigned its coal lease running from the State of Wyoming to

one, the Big Horn Coal Company. This lease was dated December 2, 1943, although the cognizant officers of the State of Wyoming did not approve it until February 3, 1944. During the month of December, 1943, the Big Horn Coal Company

(a) began construction and development of their new mine on their State land,

(b) perfected their incorporation, and

(c) filed applications for a lease of adjoining Federal coal lands on the ground that such Federal land was necessary to the commencement of their new mine.

All three acts enumerated as a, b, and c above were made in concert and therefore necessarily part and parcel of each other.

Sixth. When the pendency of the Big Horn Applications became known to the within plaintiff it filed protests against the issuance of the leases by the defendant to the said Big Horn Coal Company.

38 *Seventh.* On October 2, 1945, the defendant through the Undersecretary of the Interior, the Hon. Oscar L. Chapman, held a hearing at Denver, Colorado. At said hearing the Big Horn Coal Company urged its right to have defendant grant its application and award it a coal lease despite the aforementioned Regulation 193.3, Title 43, Code of Federal Regulations. The within plaintiff urged the disallowance of any award of said lease to Federal coal lands under said Regulation 193.3. Briefs and oral arguments were received from both the applicant Big Horn Coal Company and the within plaintiff.

Eighth. Some two years after the Big Horn Coal Company had first filed its lease application, the defendant, pursuant to legal requirement, published notice that for coal leasing purposes, he would receive offers and protests thereto on this same Federal coal land covered by the Big Horn application.

Ninth. On January 16, 1946, the Big Horn Coal Company offered to lease these public lands at a certain fixed rental. Such offer was not accepted by the defendant because of the aforementioned protests which were filed by the within plaintiff prior thereto. For this reason the defendant did not make then an award of the lease to the Big Horn Coal Company.

Tenth. On April 10, 1947, the defendant through his Director of the Bureau of Land Management, Hon. Fred W. Johnson, issued a certain writing denominated decision. Said decision contained the following:

(a) A conclusory and inferential attempt to make a finding of an old mine from a recital of so called hardship.

(b) Probative findings of fact which would necessarily compel as a matter of law a finding of a new mine.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need.

A copy of said decision is attached hereto and made a part hereof, marked Exhibit C.

Eleventh. On July 29, 1947, the defendant through his Undersecretary of the Interior, the Hon. Oscar L. Chapman, issued a writing denominated "Motion for Rehearing" which the within plaintiff had previously filed. Said decision contained the following:

(a) A reversal of the implicatory finding of an old mine previously made by the decision of April 10th although it reiterated the recital of so-called hardship in connection therewith.

(b) A finding that Big Horn was a new mine although a large and going one.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need although it expressed the possibility that the within plaintiff and the Big Horn Coal Company could possibly exist.

A copy of the dismissal of said motion for rehearing is attached hereto and made a part hereof, marked Exhibit D.

Twelfth. On October 22, 1947, the defendant issued a certain writing denominated "Motion for the Exercise of Supervisory Power." Said writing dismissed such motion which had been made previously by the within plaintiff. Said writing contained the following:

(a) An inferential restatement of the previous finding of a new mine in the denial of the motion for rehearing of July 29, 1947, and a repetition of the large going business finding.

(b) Probative findings of fact of a new mine by reference to the decision dated April 10, 1947, which would as a matter of law compel the finding of a new mine.

(c) A total omission of any finding that the coal to be mined from the Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need and complete elimination of the reference made in the dismissal of the "Motion for Rehearing" to a possibility of both mines existing.

A copy of said writing of October 22nd is attached hereto and made a part hereof, marked Exhibit E.

Thirteenth. Plaintiff further alleges that the within defendant is granted only restricted power and authority under the aforementioned Regulation 193.3 thereby limiting his discretion to grant a lease in the premises only upon the conditions that an applicant show a meeting of the criteria or requisites of Regulation 193.3. Therefore any issuance of Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company would be void and illegal because

(a) there has been no finding of the regulatory requisites and

(b) there could be no finding of the regulatory requisites in the premises.

41 *Fourteenth.* Plaintiff further alleges that the effective withdrawal orders issued January 24, 1934, by the defendant's predecessor in office were the effective exercise through a proper officer under law of power and authority conferred by 43 U. S. C. 141 *141* withdrawing the public land covered by the Big Horn lease applications, Buffalo Nos. 037885 and 039466 in the premises.

Fifteenth. Plaintiff further alleges that it is within the protected class established by the aforementioned Regulation 193.3 having the force and effect of statute.

Sixteenth. Plaintiff further alleges that the imminent threatened issuance of Buffalo leases Nos. 037885 and 039466 will irreparably and wrongfully damage to a large but unascertainable extent the business and trade of plaintiff in violation of the very manifest purpose of Regulation 193.3 Plaintiff alleges that it has already suffered loss of markets, loss of sales, loss of customers, loss of trade, and loss of profits resulting from the Big Horn Coal Company's operations on non-Federal lands. The granting of the aforementioned leases to the Big Horn Coal Company for its operation on Federal lands would result in irreparable damage in that further loss of markets, sales, customers, trade and profits, through increasing Big Horn's limited reserves, would result in an appreciable although unascertainable amount not readily compensable in damages. For which reason plaintiff has no plain or adequate remedy at law.

On information and belief, the aforesaid contract of lease are about to be executed and delivered by the defendant to a foreign corporation which cannot be served in the D. of C. with process

in respect of such lease, claimed by plaintiff to be illegal and in violation of its rights.

Wherefore, the plaintiff prays:

(a) That this Court issue its temporary restraining order against the within defendant, his agents, deputies, employees and all persons acting in concert or participation with
42-60 him or under his direction, enjoining and restraining them from issuing, signing, causing, suffering, or permitting the issuance of the aforementioned coal mining leases Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company of Sheridan, Wyoming.

(b) That upon the hearing of motion for a preliminary injunction that the Court continue the temporary restraining order in effect as a preliminary injunction.

(c) That upon final hearing the Court permanently enjoin the defendant, his agents, deputies, employees, and all persons acting in concert or participation with him from issuing or attempting to issue, or signing, causing, suffering, or permitting the issuance of the aforementioned coal mining leases Buffalo No-. 037885 and 039466 to the Big Horn Coal Company.

(d) That upon final hearing this Honorable Court may grant the plaintiff such other, further and different relief as may to the Court seem proper and just in the premises.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff,
1029 Vermont Avenue, N. W.

Dated November 1947.

(Exhibits "A" to "E" inc. omitted at this point as they are appended to the amended complaint.)

61 [Verification omitted]

62 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed Nov. 4, 1947

Comes now the plaintiff in the above entitled cause and respectfully moves this Honorable Court to grant a preliminary injunction as prayed for in the accompanying complaint.

T. PETER ANSBERRY,
STEPHEN J. McMAHON, JR.,
Attorneys for Plaintiff.

Dated November —, 1947.

Personally served copy of the within motion on Julius A. Krug by serving Martin G. White, Solicitor, 11-4-47.

W. B. Matthews, U. S. Marshal in and for the D. of C. By C. H. Ward, Deputy U. S. Marshal.

Personally served copy of the within motion on U. S. Dist. Atty. G. M. Fay, 11-5-47.

W. B. Matthews, U. S. Marshal in and for the D. of C. By C. H. Ward, Deputy U. S. Marshal.

63 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—Filed Nov. 13, 1947

Comes now the defendant, Julius A. Krug, Secretary of the Interior, by his attorney, and moves the Court to dismiss the action on the grounds

1. The complaint fails to state a claim upon which relief can be granted;

2. The complaint shows on its face that the Big Horn Coal Company and the United States of America are indispensable parties defendant which cannot be made parties;

3. The complaint fails to show that the plaintiff has any standing to maintain this action;

4. The action of the Secretary of the Interior which the complaint seeks to control is not subject to judicial review; and

5. The action of the Secretary of the Interior which the plaintiff seeks to enjoin is fully authorized by a valid act of Congress and the plaintiff, therefore, has no cause of action.

RALPH S. BOYD,
Attorney, Department of Justice,
Attorney for Defendant.

64 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

In support of the foregoing motion, defendant relies upon the points and authorities filed herein on the 13th day of November, 1947 in opposition to plaintiff's motion for a preliminary injunction.

65-74 NOTICE OF MOTION

To: T. Peter Ansberry and Stephen J. McMahon, Jr., Esquires, 1029 Vermont Avenue, N. W., Washington, D. C.

PLEASE TAKE NOTICE that the motion and memorandum of points and authorities in support thereof, of which the foregoing are copies, have this day been filed with the Clerk of the United States District Court for the District of Columbia. The Rules of Court provide that if you intend to oppose the granting of the motion you must, within five days after service of the foregoing copies upon you, file with the Clerk a memorandum of points and authorities upon which you rely in opposition, otherwise, the motion may be taken as conceded.

RALPH S. BOYD,
Attorney, Department of Justice,
Attorney for Defendant.

Washington, D. C. November 13, 1947.

Service of a copy of the foregoing is hereby acknowledged this 13th day of November, 1947. 11.45 A.M.

PETER ANSBERRY,
Attorney for Plaintiff.

75 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

AFFIDAVIT COVERING CURRENT FACTS IN SUPPORT OF PLAINTIFF'S COMPLAINT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION—Filed Nov. 14, 1947

T. Peter Ansberry and Stephen J. McMahon, Jr., being first duly sworn, depose and say:

(1) That they are members of the bar of this Honorable Court and are the attorneys for the plaintiff herein, the Sheridan Wyoming Coal Company, a foreign corporation which has no officers within this jurisdiction; that they are in telephonic communication with responsible officers of the plaintiff, whose operating headquarters are at Monarch, Wyoming.

(2) That the Sheridan-Wyoming Coal Company holds a coal mining lease, issued in 1943 (Buffalo 037167 "N"), from the United States to certain public lands located in and around Monarch and Sheridan, Wyoming. That the plaintiff has approximately one million dollars of investment in connection with its business of mining and marketing coal. That a sizable but unascertainable portion of said investment cannot be salvaged in the event that a sizable but unascertainable portion of its markets are destroyed by the within defendant's imminently threatened illegal action.

76 (3) That a graph (Exhibit F, attached hereto and made a part hereof) has been prepared from records of the State of Wyoming, duly authenticated, and other authenticated official sources, showing the inroads which have been made into these markets by the Big Horn Coal Company in the past because of its mining operations on lands belonging to the State of Wyoming, which lands are subject to the disposal laws of the State of Wyoming. This graph also makes certain projections of future demand, which are based on expert opinion and mathematical probability. This latter element proves there is no need for Big Horn's production.

(4) That this graph indicates the disastrous effect upon the market and sales of the plaintiff if the defendant be allowed to take the illegal and unauthorized action which he imminently threatens, to wit, by granting certain coal leases to the Big Horn Coal Company for the coal lands in contravention to the law of Regulation 193 3 and the statutes under which it was issued.

(5) That Fred Whiteside on behalf of the Big Horn Coal Company, by affidavit of October 1, 1946, admitted that the Big Horn Coal Company would not need the Federal coal in question for its operations until 1.87 years thereafter, assuming a yearly ratio of consumption of 500,000 tons per year (which has been the approximate rate). Such admission shows that the Big Horn Coal Company is in no emergent need for the coal in question. Affiants are under the impression that the Big Horn Coal Company by a later admission advanced their calculation of immediate need to March of 1948 but affiants are unable to locate this admission in the voluminous papers filed by the Big Horn Coal Company. Accordingly, Big Horn has no immediate need of this coal.

77 (6) That responsible officers of the Department of the Interior have undertaken to cooperate in locating certain documents and papers underlying Regulation 193.3. Title 43, C.F.R., and underlying the letters of withdrawal issued by the Secretary of the Interior, January 24, 1934.

(7) That it is known that such papers relate to overall executive policy of the administration of the Executive Department of the government as relating to the National Recovery Administration and it is believed that action was taken with the acquiescence and/or approval, and/or direction, and/or furtherance of general administrative policy, and/or documentation of the head of the Executive Branch of the government, the President of the United States. That affiants are attempting to locate the connecting records between the Interior Department, the National Recovery Administration, and the Executive Mansion, and that they are receiving the cooperation of the defendant's agents in this respect.

(8) That the within defendant is recuperating from recent illness and is out of the City. That plaintiff's attorneys are unable to see him for that reason, and that when plaintiff's attorneys did last see the defendant some four weeks ago he was then under the impression (a) that the Big Horn mine was an old mine and was not a new mine; (b) that in previous cases of this sort administratively handled within his Department they had been universally decided in favor of applicants (whereas exactly the opposite is true, and all cases involving the application of Regulation 193.3 had been universally decided against the applicant during the last fourteen years within the information and belief of affiants); and that on information and belief, the same confusion and mistake on the part of the defendant continues.

78-79 (9) That the Undersecretary of the Interior has refused a continuance until the defendant's return although he is familiar with the misunderstanding about the aforementioned facts.

the Big Horn Coal Company. Consequently, we assert that the issuance of the lease is in violation of the regulation. It is a very interesting commentary on the wisdom of this regulation with its exception clause.

At the moment, the Monarch area co-industry is in about as bad shape as it has been in the last 20 years. The railroads in that area have completely dieselized and have virtually ceased to buy coal. This consumed over half of the coal which was normally sold in the area which was produced by Sheridan prior to Big Horn getting its start as a State lessee.

Big Horn, when it did get its start as a State lessee several years ago, simultaneously applied for a Federal lease and alleged that it was unable to continue on the State land because it would run out of State coal very quickly. Big Horn has made a deliberate
112 effort to get around the wise provisions of the regulation.

Mr. Boyd has referred to the power of the Secretary to change their regulations. In the first place, regulation 193.3 has not been repealed by the Secretary. We contend it could not be repealed by the Secretary due to the reenactment of the Mineral Leasing Act upon a settled practice of the Secretary of Interior in rejecting leases which cannot satisfy the criteria of the statutory regulation.

Our company, the Sheridan-Wyoming Coal Company, has expended over $1,300,000. Sheridan, in that particular small area had no competition prior to Big Horn's coming into the fields, and would have no competition if Big Horn left.

However, other companies have always competed with Sheridan-Wyoming and would continue to do so in the future. There is no possibility of a squeeze on the public. That is not even suggested by the Department of Interior. However, we do state that if this lease is granted, both companies will be out of business very shortly because the demand for coal has actually developed even worse than we projected it in our exhibits attached to the original complaint.

The result is, if the Secretary of Interior can violate his own regulation and issue this lease in defiance of it, our company which has expended $1,300,000 on the faith of this lease, will in a very short time be bankrupt.

It is in the red now. Owing to the very sweeping ruling
113 of Judge Holtzoff, we did not amend our complaint. We did not amend it because on his theory, whether we were amended or not, we were without standing to sue. There was no objection from the defendant to argument in the District Court which covered the lease fully.

We had an allegation in the complaint that we were a member of a protected class which was intended to set up as Federal coal

sideration was plaintiff's verified complaint. At the hearing plaintiff offered and the Court received an affidavit of plaintiff's counsel. Defendant raised no issue of fact by pleading or otherwise. Therefore, for the purpose of considering plaintiff's motion for a preliminary injunction and for that purpose only, the Court, on the basis of the complaint and the affidavit of plaintiff's counsel, makes the following

Findings of Fact

1. The Sheridan-Wyoming Coal Company, Inc., is a corporation existing under the laws of Delaware, with its principal offices in Monarch, Wyoming.

2. The Defendant, Julius A. Krug, is the duly qualified Secretary of the Interior of the United States.

3. Plaintiff is engaged in mining and distributing sub-bituminous low-grade coal in the markets of 12 western states.

81 4. The defendant is about to issue a coal lease of certain lands of the United States to the Big Horn Coal Company, pursuant to their application, under authority of the Mineral Leasing Act, as amended, 30 U. S. C. 201.

5. The Big Horn Coal Company competes with the Sheridan-Wyoming Coal Company, Inc., in the production and sale of coal and, if granted a coal lease by the Secretary of the Interior, will produce coal from the lands of the United States and use that coal in competing with plaintiff. The Big Horn Coal Company is not a lessee of any federal coal lands. The plaintiff alleges that competition on the part of the Big Horn Coal Company will reduce the plaintiff's sales. The Big Horn Coal Company is not subject to service of process in the District of Columbia. Plaintiff has protested to defendant against the issuance of a coal lease to the Big Horn Coal Company, Inc. but defendant has overruled plaintiff's protests.

6. Plaintiff based its protest on the ground that the granting of a lease to the Big Horn Coal Company by defendant would violate sec. 193.3 of Title 43 of the Code of Federal Regulations and has exhausted all its administrative remedies before the Department of the Interior.

From the foregoing findings of fact, the Court draws the following

Conclusions of Law

1. Plaintiff's application for a preliminary injunction prohibiting the defendant from granting a coal lease to the Big Horn Coal Com-

lessees, a franchise class like the situation in Frost versus the Commission in the Supreme Court where in that case there was a State law which required a cotton ginner to have a license, if Your Honor recalls the case.

It required in order to have a license to operate a cotton gin in this southern State, the applicant must show there was need for his services. A license was issued to a competitor of Mr. Frost without that showing of need for the competing cotton gin, and the Supreme Court held that the issuance of that lease was illegal.

We think we stand on all fours with the Frost case, assuming we are permitted to amend our complaint.

The Court of Appeals stated in its opinion that they issued the temporary injunction pending appeal because they had the lease before them. They were unable to reverse the holding of the District Court because for purposes of the appeals, they did not have before them this same lease which we are now seeking to insert into the record.

114 My associate, Mr. McMahon, has a few words to say.

MR. MCMAHON: I would like to address myself to apply to Mr. Boyd's argument, however, merely as to the merits of the two motions, rather than the general motion of the case.

Mr. Boyd started off with opposition to our filing the amended complaint as of course on the ground that plaintiff takes the position that the motion to dismiss the original complaint was not a responsive pleading, therefore, the complaint can be amended despite the fact that the motion to dismiss was sustained.

The cases I have examined are all one way on the point of an amendment as of course being allowed under Rule 15-A at any time prior to a responsive pleading.

A motion to dismiss is not a responsive pleading. Our position on that score is that we are entitled to file our amended complaint as of course.

We filed the other motion for leave to file that complaint merely because of the shortness of time. We thought it would bring up the question if the Department of Justice objected, which they did, in an informal way. They objected to the filing of our amended complaint.

The second point which Mr. Boyd made was that the amended complaint which plaintiff has tendered does not show any facts which either did not exist or were not known to plaintiff or its counsel when the original complaint was filed, or at least

115 when the original complaint was dismissed.

Mr. Boyd offered criticism. He said we did not amend after that point. Mr. Boyd accepted our argument under the lease that day in court as contained in the complaint. He did not make any objection at that point. He did not ask information which was

pany should be denied because there is no substantial likelihood that plaintiff can prevail at the final hearing of this action.

2. Plaintiff has not alleged or shown that it has any standing to sue because it has not shown that the intended action of the Secretary of the Interior will violate any legal right of plaintiff.

82-84 3. The power of the Secretary of the Interior in granting coal leases under the Mineral Leasing Act, as amended, 30 U. S. C. 201, is discretionary and not subject to judicial review.

4. Sec. 193.3 of Title 43, Code of Federal Regulations, is a declaration of policy by the Secretary which does not diminish or restrict the Secretary's powers and discretion vested in him by the Mineral Leasing Act.

5. The Big Horn Coal Company, the proposed lessee, is not a necessary party to this action. The United States is not a necessary party to this action.

ALEXANDER HOLTZOFF,
Justice.

Washington, D. C. November 17, 1947.
No objection as to form.

T. PETER ANSBERRY,
Attorneys for Plaintiff.

85 Clerk's Certificate to foregoing transcript omitted in printing.

86 UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

[File endorsement omitted]

No. 9704

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

v.

JULIUS A. KRUG, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued January 12, 1948. Decided March 29, 1948.

MR. T. PETER ANSBERRY, with whom MR. STEPHEN J. MCMAHON, JR., was on the brief for *Appellant*.

his proper remedy. He did not ask for a more specific bill of complaint.

The reason we did not do that is that it seemed vain to do so inasmuch as Judge Holtzoff took it into consideration in his opinion.

The third point which Mr. Boyd makes is that it is much easier for plaintiff to follow a court in which two bites would not have to be made after the cherry.

The reason for that is that the Court of Appeals framed their opinion and also their order upon our application over the opposition in the form that they did.

We are required to proceed under that outline.

The defendant also makes a point of the fact that he claims that this third party, the Big Horn Coal Company, who was the candidate for this lease before the Secretary of Interior, would be greatly damaged by delay. The Court of Appeals accepted affidavits on that point, and went over it thoroughly before they granted us a temporary injunction pending appeal last December 4. They extended it over and beyond the time that the mandate of the
116 Court of Appeals reached this court, to give this court an opportunity to act.

Further than that, Mr. Boyd asked for a thirty-day extension in the meantime to stay the mandate in the Court of Appeals while they considered whether or not they should apply for certiorari because of the form of the court's amendment to their original opinion allowing this court to entertain an amending of the complaint motion.

The last point which Mr. Boyd made is that the only reference to the lease, the regulations promulgated shall have the right to cancel these—and so forth—I submit that all goes to the merits of the case and the proper remedy on that score, if Mr. Boyd thinks he has any objection as to the validity of this amendment, is a motion to dismiss after it is amended.

I have a case here which I would like to make a part of the record. It is Judge Thatcher's case. It was just about the same type of case. The parties were in the District Court. They wanted to amend their complaint two years after the filing of the original complaint.

The following language is quoted from page 312 of 31 Fed. 2d, Carnahan versus Peabody, District Court, Southern District of New York, 1929:

"To deny the motion to amend for defects in the amended pleading, not considered on the prior motion to dismiss, would seriously prejudice the right to review a determination,
117 in form discretionary, but in fact going to the merits of the plaintiff's cause of suit. Proper practice in such case is to grant the motion to amend, and then consider upon motion

to dismiss, all questions not previously decided which go to the sufficiency of the bill as amended. Substantial rights of the parties are not affected by the amendment, nor has the prior bill of complaint been answered."

That is the end of the quotation.

Your Honor, there is one general point about Mr. Boyd's argument and about this memorandum he previously submitted.

In reply to our original memorandum in support of both of our motions, he did not undertake to answer any but one of the cases. That is a point I shall not go into. He discussed one. It occurred to me that there is an admission contained in both his argument and this memoranda; that it is impossible to object to an amendment at this point and under the circumstances. He has cited no cases in support of his view.

That concludes my remarks.

THE COURT: Did I understand you to say that this opinion which Mr. Ansberry handed me has been amended?

MR. MCMAHON: Yes, Your Honor. I perhaps can find it in the record.

MR. BOYD: It was not the opinion, the mandate.

118 MR. MCMAHON: The judgment.

MR. BOYD: The judgment.

THE COURT: That is the amendment that you speak about?

MR. ANSBERRY: That is correct.

THE COURT: Very well, gentlemen. Is that all?

MR. ANSBERRY: I have one more thing. Mr. Boyd suggested that we had the lease in our hands at the time of the hearing on the motion to dismiss. That, as a matter of fact, is incorrect. I did not have the lease before me at that time in full. I had excerpts from the lease at that time.

MR. BOYD: If Your Honor please, I did not say that Mr. Ansberry had the lease. I said there is no showing that he did not. Secondly, he said he had excerpts. The form of lease as described by the regulations is published in the Federal Code of Regulations, so it is available to the whole world.

He suggested to Your Honor that there is no need for the Big Horn Coal Company's production, but Sheridan-Wyoming, the plaintiff in this case, is presently applying to the Department of Interior for the extension of its leases to additional Federal coal lands so it can expand its production in this area. So if there is need for expansion for the plaintiff, it would seem to be only reasonable that there is need for coal production.

They are simply trying to produce it themselves rather
119 than have a competitor in the field.

As to the point that I did not answer, those cases they

MR. ROGER P. MARQUIS, Attorney, Department of Justice for *Appellee*.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, J.J.

OPINION—Filed March 29, 1948

PRETTYMAN, *J.*:

Appellant was plaintiff in a civil action brought in the District Court to restrain the appellee Secretary from executing and delivering to the Big Horn Coal Company two mining leases of federal coal land. The Secretary moved to dismiss the complaint upon the ground, among others, that it failed to state a cause of action upon which relief could be granted. The District Court granted the motion upon that ground.

In its complaint plaintiff alleged that it was "engaged in the mining and distribution of sub-bituminous low grade coal in the markets of some twelve western states" and, further, that "it is within the protected class established by . . . Regulation 193.3[1] having the force and effect of statute." It alleged that that regulation precludes the granting of further leases of public coal lands, unless it be shown that there is an actual need for coal which cannot otherwise reasonably be met. These were the only allegations in the complaint concerning the status and rights of the plaintiff. The claim thus depicted was a general right of the coal industry to be protected against further competition. Under the decisions of the Supreme Court in *Alabama Power Co.* v. *Ickes*,[2] and kindred
87 cases,[3] the District Court was clearly correct in holding that claim not one which the courts could entertain. Those cases dispose of appellant's first point, that as a member of the existing coal industry it had a standing to sue for protection against the proposed new lease. Obviously, appellant had no right, derivative from his membership in the existing coal industry, to complain of competition from other coal companies, new or old. Therefore, under those cases, the mere coincidence of some illegality which enables Big Horn to compete, is immaterial.

Appellant's second point is that it is, and has been for some time, a lessee of federal coal lands; that the regulation above mentioned, having the force of a statute, was part of its lease; and that

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[1] 43 Code Fed. Regs. § 193.3 (1938) (Dept. of the Interior Regulations Applicable to Coal Permits, Leases, and Licenses Exclusive of Alaska).

[2] 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).

[3] Tennessee Power Co. v. T. V. A., 306 U. S. 118, 83 L. Ed. 543, 59 S. Ct. 366 (1939); New Orleans, M. and T. R. R. v Ellerman, 105 U. S. 166, 26 L. Ed. 1015 (1882).

this combination of circumstances created in it a property right which was threatened with invasion by the new lease. Appellant says that the claim thus depicted falls within the doctrine of the *Chicago Junction Case*[4] and kindred cases[5] and under the general considerations which controlled the Court in deciding *Federal Communications Comm'n v. National Broadcasting Co. (KOA)*[6] and similar cases.[7] Those cases involved claimed protection against threatened invasion of special interests, amounting to property rights, created by statute or valid regulation, in persons in certain circumstances, or those having, or granted, contracts or licenses. Under the decisions, those persons were entitled to sue. The difficulty with the contention in the present case is that no such claim was stated in the complaint.[8] Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease.

The Rules of Civil Procedure[9] provide that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief". The Rule was intended to obviate the technicalities of pleading and, particularly, long and verbose allegations of evidentiary facts. With that objective we are in unqualified accord. However, a "claim" cannot be stated in the form of a legal conclusion, without more, such as the above-quoted allegation as to the "protected class". The minimum under the Rule is that the adversary party must be sufficiently advised to prepare his defense, and that the court must be sufficiently informed to determine the question presented. Defenses cannot be made to legal propositions in the abstract, nor do mere legal conclusions present questions upon which the court can pass. Justiciable cases and controversies arise upon facts.[10] The case at bar is an illus-

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[4] Baltimore & Ohio R. R. v. United States, 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317 (1924).

[5] Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929); Germania Iron Co. v. James, 89 Fed. 811 (C. C. A. 8th 1898).

[6] 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943).

[7] Federal Communications Comm'n v. Sanders Radio Station, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940); *see* Mr. Justice Douglas, dissenting in Scripps-Howard Radio v. Comm'n, 316 U. S. 4, 21, 86 L. Ed. 1229, 62 S. Ct. 875 (1942).

[8] Perkins v. Lukens Steel Co., 310 U. S. 113, 125, 84 L. Ed. 1108, 60 S. Ct. 869 (1940).

[9] Fed. R. Civ. P., 8(a)(2).

[10] Authorities need hardly be cited, but *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239 *et seq.*, 81 L. Ed. 617, 57 S. Ct. 461 (1937), is a succinct recent statement.

88 tration. The court cannot pass upon a contention concerning the content, meaning and effect of a lease, when the plaintiff does not allege in its complaint either the execution or the content of the lease, or, indeed, even that it is a lessee.

In the District Court the plaintiff filed a motion for a preliminary injunction and, at the hearing on that motion, filed a paper executed by its counsel and entitled "Affidavit Covering Current Facts in Support of Plaintiff's Complaint and in Support of Plaintiff's Motion for Preliminary Injunction". The court accepted the affidavit for the purpose of deciding the motion, and for that purpose made findings of fact and reached conclusions of law. The affiants said, among other things, "That the Sheridan-Wyoming Coal Company holds a coal mining lease, issued in 1943 (Buffalo 037167 'N'), from the United States to certain public lands located in and around Monarch and Sheridan, Wyoming." Apart from the question whether so general an allegation, if it had appeared in the complaint, was sufficient to place in issue the nature and content of the lease, it seems clear that the affidavit of counsel was not part of the consideration of the District Court upon the motion to dismiss. The defendant did not have to plead to the affidavit, and it had a right to require the court to pass upon the sufficiency of the claim presented by the complaint, and not upon some other claim otherwise presented. The District Court passed upon the claim presented by the complaint, and that is all it was required or empowered to do. The Rule above cited is simple and plain and represents the minimum essential for the orderly presentation, determination and disposition of cases and controversies by the courts.

In this court appellant filed a motion for a temporary injunction pending appeal. Appellee opposed and filed an affidavit of the president of Big Horn. Thereupon appellant filed a reply memorandum and some supporting documents, among which were a counter affidavit of its president and a copy of a lease between it and the United States. But the exhibits filed in this court in support of the motion for an injunction pending appeal are not before us on the merits of the appeal. The appellant cannot cure a fatal defect in its complaint by filing affidavits in this court after it has appealed.

Appellant contends that it gains standing to sue by virtue of the proceedings before the Department, to which proceedings it was a party and in which, it alleges, the Secretary conceded that its "legal rights would be invaded if Regulation 193.3 were violated." It cites language from the *Chicago Junction Case*, *supra*, as follows: "Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest." [11]

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[11] *Supra* note 4, at 268.

Restored to its context, the language quoted obviously does not support appellant's standing to sue. Four sentences earlier in the opinion, Mr. Justice Brandeis found that any party to a proceeding before the Interstate Commerce Commission had a statutory right to sue. And succeeding sentences in the same paragraph show that the implied finding of interest arose, not out of the fact of intervention *per se*, but because "leave [to intervene] can be granted only to one showing interest" and intervention had been allowed. Appellant here fails to invite our attention to any similar statute or
89 procedural rule applicable to proceedings and parties before the Department of the Interior. And no convincing reason is presented why the Secretary has, by permitting the company's "intervention", conceded its standing to sue. There were no formal "proceedings" with "parties"; at most, the Secretary was merely entertaining appellant's protests. There is nothing which warrants a holding that the Secretary is estopped to raise the claim, which he now strongly espouses, that there is no such standing.

The judgment of the District Court is

Affirmed.

EDGERTON, *J.*, concurs in the result.

90 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9704—January Term, 1948

[File endorsement omitted]

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

vs.

JULIUS A. KRUG, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Before: GRONER, *C. J.*, and EDGERTON and PRETTYMAN, *JJ.*

JUDGMENT—Filed March 29, 1948

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per MR. JUSTICE PRETTYMAN.

Dated March 29, 1948.

MR. JUSTICE EDGERTON concurs in the result.

91 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9704

[Title omitted]

[File endorsement omitted]

APPLICATION TO THE COURT TO MODIFY THE JUDGMENT—Filed April 9, 1948

It appearing that this Court concurred in the trial court's view as to standing to sue on the then status of the complaint, but refrained from ruling on the question of the legality or illegality of the threatened action because of a deficiency of allegation as to the lease in question:

> "The difficulty with the (appellant's) contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of Federal coal lands or indicate the nature, content or extent of any lease" (Page 2 of this Court's opinion).

It thus further appearing that this Court's affirmance is based upon the deficiency of the complaint as it existed at the time of dismissal and the District Court decision was based upon the complaint as it might have been amended by the allegation of the plaintiff's Federal lease, it is respectfully suggested that the Court incorporate any or several of the following alternative forms of relief in its mandate on the decision in this cause:

92 1. That the affirmance is subject to the condition of appellant being allowed five days after receipt of the mandate by the District Court to amend its complaint to include the lease.

2. That the affirmance is without prejudice to appellant amending its complaint accordingly within five days of the receipt of the mandate by the District Court.

With the further relief that the temporary injunction pending appeal issued in this cause on the fourth day of December, 1947, be continued until the District Court acts on appellant's amended complaint or its motion to amend.

(s.) T. PETER ANSBERRY,
(s.) STEPHEN J. MCMAHON, JR.,
Attorneys for Appellant.

Service acknowledged this 9th day of April, 1948.

(s.) ROGER P. MARQUIS,
Attorney for Appellee.

93 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

April Term 1948

No. 9704

[File endorsement omitted]

[Title omitted]

Before: Edgerton, Prettyman and Groner, JJ.

ORDER AMENDING THIRD PARAGRAPH OF JUDGMENT—Filed April 23, 1948

On consideration of appellant's motion to modify the judgment herein, it is ordered by the court that the third paragraph of the judgment of this court in this cause be, and it is hereby, amended to read as follows:

> On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed, with leave to the District Court, however, to entertain a motion by plaintiff, if it be so advised, to amend its complaint, and with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper, provided that such motion be made within 10 days after the mandate in this cause is filed in the District Court, and the temporary injunction issued by this court herein on December 4, 1947, is therefore hereby continued in effect for ten days after the mandate in this cause is filed in the District Court. Schaff v. R. W. Claxton, Inc., 79 U. S. App. D. C. 207, 144 F. 2d 532 (1944).

Per Curiam.

Dated April 23, 1948.

94-97 [Caption omitted]

98 DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., PLAINTIFF

vs.

JULIUS A. KRUG, DEFENDANT

Reporter's Transcript of Proceedings on Motion for Leave to File Amended Complaint—Filed July 12, 1948

Washington, D. C., Tuesday, June 15, 1948.

The motion was heard by Associate Justice F. Dickenson Letts in the Third Civil Division at 11:15 a. m.

APPEARANCES:

On behalf of the Plaintiff:
T. PETER ANSBERRY, and STEPHEN J. MCMAHON.

On behalf of the Defendant:
HOWARD S. BOYD, Department of Justice, and LEONARD NETSORG, Department of Interior.

99 PROCEEDINGS

THE CLERK: Sheridan-Wyoming Coal Company, Inc., versus Julius Krug, No. 4665-47.
THE COURT: Who brings this motion?
Mr. ANSBERRY: I do, Your Honor.
THE COURT: For the plaintiff?

ARGUMENT ON BEHALF OF PLAINTIFF

Mr. ANSBERRY: For the plaintiff.
If Your Honor will refer to the opinion of the United States Court of Appeals, which is rendered in this case and which is a part of the record before Your Honor; Your Honor will find that the Court of Appeals after a dismissal in the District Court before Mr. Justice Holtzoff last November granted a temporary injunction pending appeal, and then subsequently affirmed the dismissal on the ground that the plaintiff had failed to allege an essential fact, namely, that the plaintiff was the holder of the Federal co-lease, and that the regulation which the plaintiff asserts as being violated, was a part of that lease.

If Your Honor will refer to pages 2 and 3 of the Court's opinion, you will find that there are two questions involved in this case.

May I have your copy?

THE COURT: Thank you.

MR. ANSBERRY: One question is whether the issuance of the lease in question to the competitors of the plaintiff, the Big Horn
100 Coal Company, is illegal. The second question is, if it is illegal, whether the Sheridan-Wyoming Coal Company has any standing to sue.

There were three theories on that subject presented to the District Court of Appeals. The theory of the plaintiff was that if the competition itself was illegal, by that fact alone, we had standing to sue under this Chicago Junction case and related cases.

There was a second theory possible which has been adopted by the Court of Appeals, namely, that if the regulation complained of is a part of our lease, and if we have a Federal lease of coal lands, then we have reason for violating the regulation.

The third theory was the theory adopted by Mr. Justice Holtzoff, and it was this: no matter whether we had a lease or not; there was no standing to sue because the regulation was solely for the protection of the public and not for the protection of any particular class of people.

As a result of a misunderstanding, in the District Court, we had the fact of our lease before Mr. Justice Holtzoff as a part of our affidavit itself, and we did not feel it necessary to amend that because his theory was broad enough and an amendment would not have aided us in any respect.

Consequently, it went up without being amended to include our lease which we did not have at the time we drew the com-
101 plaint. We did not have it before us, as counsel. The Court of Appeals has now said, in effect, that had we pleaded the lease, we might have been entitled to prevail, and we moved the Court of Appeals to grant us permission to amend the complaint.

They took this action: they granted leave to Your Honor to permit the amendment, if in your judgment the interest of justice required that it should be amended. We feel this should be amended in order that we may reach the real controversy in the case, and not have it continue with this misunderstanding that occurred in the District Court.

As to whether the lease was before the District Court or not, that is a part of our case. So we ask Your Honor, first, to allow us to amend as of course, inasmuch as there has been no responsive pleading filed; therefore, we are entitled to amend as of course, and in the alternative, we should be granted leave to amend.

THE COURT: Did you amend once?

Mr. ANSBERRY: By interlineation, prior to the granting of the temporary restraining order. That was by order of the Court.

THE COURT: I thought I saw that there was an amended complaint filed.

Mr. ANSBERRY: We did file the complaint, Your Honor, on the theory that we might file as of course under Rule 15-A.

102 THE COURT: You do not mean to say you are asking to amend as of course the second time?

Mr. ANSBERRY: Inasmuch as the other amendment was by order of the Court, it became a part of our original complaint. This was done by leave of the Chief Justice. The first time that the defendant Krug saw the complaint, as it was, was when we went to the Court of Appeals.

THE COURT: Why would the Court of Appeals say that this Court must, as a matter of course, permit the amendment?

Mr. ANSBERRY: I assume that Your Honor would not wish to interfere with this Court on the matter of this Court's policy. We merely wish to extend our restraint because the minute it should expire, the defendant would give the lease to the Big Horn Coal Company which is not subject to the process of this Court, and the jurisdiction of this Court would be lost. The Court of Appeals has given restraint to us until ten days after the mandate reaches this Court.

THE COURT: I notice when you filed your amended complaint in giving notice to the attorney for the defendant, you said, "Notice of Filing Amended Complaint as of course." Doesn't that mean you were exercising your privilege under the rule?

Mr. ANSBERRY: That is correct, but that was opposed by the defendant.

THE COURT: I understand you still think that you are entitled to amend again as of course?

103 Mr. ANSBERRY: No. The amendment which Your Honor has before you is the only one which we have in mind. The amended complaint is dated sometime in May of this year.

Mr. McMAHON: May 25, Your Honor.

THE COURT: I see. That has not been allowed as yet.

Mr. McMAHON: We filed as of course, and the Clerk accepted it under 15-A. We then on the same day, because we had only ten days more of temporary restraint from the Court of Appeals, also filed a motion for leave to file that very amended complaint which we had already filed. We did that anticipating any possible objections on the part of the defendant's attorneys. They have objected to our filing of the complaint. They have also objected to our motion for leave to file an amended complaint.

THE COURT: Yes. All right.

Mr. ANSBERRY: We also, of course, are asking Your Honor for a preliminary injunction to further restrain the issuance of this lease.

THE COURT: I think we better consider this motion to amend.

Mr. ANSBERRY: I have very little to say on the subject except that the real controversy in the case has not been reached because under the law as the Court of Appeals has laid it down in their opinion, the Court of Appeals in amending their mandate pursuant to our motion referred to the Schaff case which Your Honor
104 may recall was a case in the District Court they held in an automobile negligence case that a man was not responsible for having left his car unlocked. There was a later Court of Appeals decision in another case which made that negligence, with the result that the Court of Appeals in the Schaff case reversed and remanded with instructions to permit an amendment of the case to state that the car was left unlocked. So we are in a situation where the District Court fits a somewhat different view of the law than the Court of Appeals has now expressed.

We also had a different view of the law. Now we want to amend to the law the Court of Appeals has laid out for us in this opinion. That is all at the moment.

ARGUMENT ON BEHALF OF DEFENDANT

MR. BOYD: If your Honor please, it is our position that first, the plaintiffs have no right to amend as of course.

Secondly, that they ought not be given leave to amend. Their argument about having the right to amend as of course comes to this: when a complaint is filed in this court, and the motion to dismiss is made and sustained by this Court, and the judgment of this Court dismissing the complaint is affirmed by the Court of Appeals; then under the rules, they may amend the complaint and start the litigation all over again. We submit that that is a preposterous construction of the rules.

105 Under those circumstances, that is the only possibility of amendment.

THE COURT: Did the Court of Appeals give any directions as to that situation?

Mr. BOYD: The Court of Appeals order provides that this court shall have—perhaps I better read the whole thing:

> "On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed, with leave to the District Court, however, to entertain a motion by plaintiff, if it be so advised, to amend its complaint, and with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems

proper, provided that such motion be made within 10 days after the mandate in this cause is filed in the District Court, and the temporary injunction issued by this court herein on December 4, 1947, is therefore hereby continued in effect for ten days after the mandate in this cause is filed in the District Court."

So there is no direction to the court except to hear and entertain a motion for leave to amend.

We contend, of course, that with that mandate of the Court of Appeals, this court does have the power and duty to entertain
106 a motion, but not to grant a motion for leave to amend.

We submit that the motion for leave ought to be denied as a matter of sound public policy. There are no supervening facts. There is no new law. There is nothing new here that is being offered. There is nothing that the plaintiffs did not have at the time the suit was originally brought. It is suggested that plaintiff's counsel did not have before them a copy of the lease from the United States which they now undertake to assert, at the time the suit was brought. However, it is not suggested that they did not have full information about that lease at least when the motion to dismiss was sustained. Nevertheless, when the motion to dismiss was sustained, they did not ask leave to amend then.

Had they done so, and had there been any substance to the theory which they now seek to advance, the amendment could have been allowed. Then when the appeal was taken, the whole case could have been disposed of. Instead, they went to the Court of Appeals on the single theory that they had chosen to take.

We submit that litigants ought not to be encouraged to try their cases in pieces and have their cases going up to the Court of Appeals, then back to this court, and then back again to the Court of Appeals and perhaps amended again after that.

In addition, we submit that leave to amend ought not to be granted because the proposed amendment will not change
107 the result. There is no substance, whatever, to the contention which they are urging on the merits.

Their position is this: we, the plaintiff, have a lease of federally-owned coal lands. We received that lease sometime in the early 1940's. At the time we received that lease, there was a regulation promulgated by the Secretary of the Interior which stated that as a matter of policy, the Department of Interior would not grant coal leases until there was a showing of need for the coal to be produced under the lease which was sought.

It is charged in this amended complaint that plaintiff relied upon that regulation. They say that the Big Horn Coal Company, which is the prospective lessee, has not made such a showing as that, and that the Secretary has not made findings that its production

on the Federal land is necessary to supply the needs of the community which it serves.

They make other charges that there is a failure by the Secretary to comply with that in full. But it is perfectly plain that the Secretary can change his regulations whenever he deems it wise to do so. The fact that a regulation was in force in 1943, and that this plaintiff sought and obtained a lease, does not tie the hands of the Secretary and strip him of the statutory rights which promulgate the reasonable and proper regulations.

The case they tried to make is that since he, the Secre-
108 tary had promulgated a regulation 1, and they, the plaintiffs, had a lease when that regulation was in force, that thereafter that regulation is a part of their contract of lease, and that the Secretary of the Interior cannot alter, amend, change or disregard that regulation.

The way they tried to put that regulation into the lease is by pointing to a provision of the lease which, in substance, is that if plaintiff does not comply with existing regulations, the lease may be cancelled. It says nothing, whatever, about the Secretary's being bound to keep the existing regulations in force without change. It says nothing, whatever, about the plaintiff's being entitled to rely upon a continuation of those regulations unchanged.

We submit that such a provision in the lease gives them no standing to sue, whatever, when the Secretary, in his judgment, under valid statutory authority undertakes to grant a lease to the third party, one will simply continue to compete with the present plaintiff.

The only damage they suggest is that they are threatened with his continued competition.

What this suit is really, is an effort by the plaintiff to strangle a competitor and to put the competitor out of business if they can. That appears quite plainly from the nature of the action and from the charges of the complaint. We submit that lawful com-
109 petition, and this is lawful competition, is not a basis for any suit. It has been said to Your Honor that the Court of Appeals include this theory. The Court of appeals expressly refused to pass upon it. The Court of Appeals said the record did not contain any allegations about this lease. It appears only in an affidavit submitted to us in connection with an application for an injunction. Therefore, it is not before us, and we do not decide anything about it. It is for the District Court to decide.

We submit there is no merit to it whatever. It has not been approved by the Court of Appeals. If the amended complaint is permitted to be filed, it will not change the result one iota. It will simply have to be dismissed again. We submit that lease if filed should be denied.

THE COURT: Assuming that you are permitted to amend, what do you say to the other motion which I believe is for preliminary injunction?

CLOSING ARGUMENT ON BEHALF OF PLAINTIFF

Mr. ANSBERRY: Your Honor, that brings us to the matter which has been discussed by Mr. Boyd.

This lease is Buffalo No. 037167.

> "This indenture of lease, entered into, in quintuplicate, this 24th day of December A. D. 1943, by and between the United States of America, and in this behalf by the First Assistant Secretary of the Interior, party of the first part, hereinafter called the lessor, and Sheridan-Wyoming
> 110 Coal Company, Inc., of Monarch, Wyoming, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the Act of Congress, approved February 25, 1920 (41 Stat. 437), entitled 'An Act to Promote the Mining of Coal, Phosphate, Oil, Oil shale, gas, and Sodium on the public domain,' hereinafter called the 'Act.'"

So the lease is subject to the Mineral Leasing Act. This regulation 193.3 was issued pursuant to specific authority in the Mineral Leasing Act for the issuance of regulations.

It has been held previously in the case of Hodgson versus the Midwest Oil Company, that these regulations issued by the Secretary of Interior, have the force and effect of a statute; they become a part of the statute. Moreover, since this regulation, 193.3 was promulgated in 1934 by the Secretary of Interior, the Mineral Leasing Act has been reenacted several times. So, there, we have a Congressional reenactment of the regulation, and we assert that this first paragraph of the lease makes the regulation 193.3 part and parcel of the lease. In any event, since that regulation has the force of statute, it is like all relevant statutes, a part of any lease that is entered into under the statute.

The very purpose of the regulation itself was to prevent unnecessary and damaging and harmful constitution to Federal coal lands.

> It was issued at a time when the coal industry all over the
> 111 United States was in very bad shape. As Your Honor will recall, there was bloodshed and violence and trouble. The regulation, however, has an open-up clause; that is, if anyone can show need for a new coal demand on the part of the consumers of the area they propose to serve, they will be allowed a Federal lease.

In this case, there has been expensive litigation before the Department of the Interior. The Department of the Interior has been unable to find that there is consumer need for the production of

cited were so far removed from this case that it was impossible to distinguish them except by saying that they have no application.

At the hearing before Mr. Justice Holtzoff, I did not object to the arguments they presented. I do not understand that counsel had the right to object to arguments to the court. I can object to the introduction of evidence and improper argument to the jury, but counsel can present what argument he pleases without interruption by opposing counsel. I do not understand it to be the duty of opposing counsel to bring the errors to the attention of his opponent. They simply failed to plead the lease as the Court of Appeals held they did. That is why the Court of Appeals refused to consider it when the case was brought there.

If Your Honor is considering the granting of leave to file and perhaps an injunction, I wish to bring this fact to your attention: Big Horn Coal Company, which is the real party in interest, has informed me through its counsel that it wishes to be heard and perhaps to intervene in this action to oppose the granting of injunction if that is within the contemplation of Your Honor.

THE COURT: I will take the papers, gentlemen, and see what I make of them. I will take it under advisement.

120 MR. MCMAHON: Your Honor, we would like to make an additional motion in open court in the event that Your Honor takes it under advisement to the effect that we move for a temporary injunction, a preliminary injunction, pending an opportunity for us to go to the Court of Appeals in the event that the preliminary injunction is denied by Your Honor or in the event that the amendment of the complaint is disallowed by Your Honor.

THE COURT: That suggestion is not timely.

MR. ANSBERRY: No, but the Court of Appeals' restraint expires in two days. If Your Honor should not conclude his deliberations before that time, there is a risk of losing jurisdiction.

THE COURT: It expires two days from now?

MR. MCMAHON: Yes, Your Honor.

THE COURT: I think it should be continued until I have acted. Do you agree to that, Mr. Boyd?

MR. BOYD: To the entry of such an order? While Your Honor has it under consideration, we must consent.

THE COURT: You may prepare such an order.

(At 11:45 a. m., the hearing was concluded.)

121 Reporter's Certificate to foregoing transcript omitted in printing.

122 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO FILE AMENDED PLEADING—Filed May 25, 1948

To: Ralph S. Boyd, Attorney for Defendant, Room 2131, Department of Justice, Washington, D. C.

Please take notice that we have this day filed a motion before the District Court of the United States for the District of Columbia for leave to file an amended pleading and have requested that an oral hearing be held thereon in the forenoon of Tuesday, June 1, 1948, at 10 o'clock or as soon thereafter as counsel may be heard.

A copy of said amended complaint together with additional Exhibits H through K has already been served upon you the 25th day of May, 1948.

Please take notice that supporting points and authorities are served herewith and the local rules of court provide that opposing points and authorities must be served within five days or such further time as the court may grant.

Dated: May 25, 1948.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Service of a copy of the foregoing notice is hereby acknowledged this 25th day of May, 1948.

RALPH S. BOYD,
Attorney for Defendant.

123 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED PLEADING—Filed May 25, 1948.

Comes now the plaintiff herein and in addition to the filing of its amended complaint as of right in this cause the 25th day of May,

1948, moves this Honorable Court for leave to file said amended complaint.

The grounds for such motion are:

1. That the defendant may erroneously oppose the filing of said amended complaint as of course;

2. That a temporary injunction pending appeal granted by the Court of Appeals on December 4, 1947 was extended by that Court until ten days after the mandate of that court was filed in this court on May 25, 1948:

3. That justice so requires in order that all issues between the parties may be fully litigated in this action, and that plaintiff be given an opportunity to correct the defects in its original complaint, dismissed by order of this Court on November 17, 1947; and

124 4. That the third paragraph of the Judgment of the Court of Appeals (App. D.C. #9704, decided March 29, 1948) grants leave to this Court to entertain such motion.

The amended complaint is substantially the same as the original complaint filed in this cause on November 4, 1947, except for:

1. The first section thereof (pages 1 through 3 of the amended complaint) which has been substantially amended, and

2. Exhibits H through K, which have been added thereby, and which are also attached thereto.

Plaintiff requests an oral hearing upon this matter before a Justice of this Court at 10 o'clock in the forenoon of Tuesday, June 1, 1948, or as soon thereafter as counsel can be heard.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated: May 25, 1948.

Service of a copy of the foregoing motion is hereby acknowledged this 25th day of May, 1948.

RALPH S. BOYD,
Attorney for Defendant.

125 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDED COMPLAINT FOR AN INJUNCTION—Filed May 25, 1948

The plaintiff for its complaint herein states to this Honorable Court as follows:

First. (a) The Sheridan-Wyoming Coal Company is a corporation organized and existing under the laws of the State of Delaware with its principal offices in Monarch, Wyoming. It is engaged in the mining and distribution of sub-bituminous low grade coal in the markets of some twelve western states, to-wit, Washington, Oregon, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri.

(b) That a valid and lawful regulation of the United States, now known as Regulation 193.3., F. C. R. 43, was promulgated and published on February 1, 1934, under the Mineral Leasing Act of 1920 as amended, and has become a part of the Mineral Leasing Act. A copy of said regulation is attached hereto and made a part hereof marked Exhibit F.

(c) That throughout the entire existence of said regulation, since the date of its promulgation over fourteen years ago, defendant and his predecessors in office have not issued a single coal mining lease without a showing and a finding of the requisite need
126 for an additional mine under said regulation; and that even since as recently as March, September and December of 1946, he has denied several leases because the required finding could not be made. Copies of these decisions, which the defendant has conceded represent the heretofore uniform rule of all such previous decisions under said regulation, are attached hereto and made a part hereof, marked Exhibits G, H, and I.

(d) That Sheridan-Wyoming Coal Company, plaintiff herein, holds and has held a contract of lease from the United States under said Mineral Leasing Act, described as Buffalo 037167 "N" dated September 24, 1943, copy attached hereto as Exhibit J, and made a part hereof, and that said lease is in full force and effect and plaintiff has fully complied therewith.

(e) That, under the terms of said lease, plaintiff was required to make an investment in "actual mining operations, development or improvements" of at least $60,000; that plaintiff, in reliance upon

the Regulation, has made and duly reported to the lessor expenditures in compliance with the lease totalling $1,352,314.50 in the four years ended September 30, 1947; (these expenditures included at least $110,000 in new mechanized underground mining equipment, and other large but unsegregated expenditures in cutting thirty entries during the year ended September 30, 1944); that as a result thereof plaintiff mined in excess of 1,300,000 tons of coal from the leased land and paid royalties thereon to the defendant and his predecessors, and that plaintiff will lose a large but unascertained portion of its investment over and above $3,000.00 which is non-recoverable, in the event that the defendant should violate said regulation by issuing coal leases described as Buffalo numbers 037885 and 039466 to the Big Horn Coal Company, which he now imminently threatens to do.

127 (f) That plaintiff entered into said lease and made the above investment in reliance upon the terms of said regulation and the heretofore uniform custom, practice, and usage established by the defendant and his predecessors in office and their other officers, servants, and employees in denying leases which violated the requisites of Regulation 193.3.

(g) That when plaintiff entered said contract of lease, the terms of said Regulation and the heretofore uniform custom, practice and usage thereunder established by the defendant and his predecessors in office and other officers, agents, servants, and employees, was a part of the consideration it bargained for and obtained.

(h) That the Big Horn Coal Company of Sheridan, Wyoming, has been a competitor of the plaintiff and has been engaged in the mining and distribution of coal from state lands since it applied for certain Federal coal leases hereinafter more fully referred to, while awaiting the granting of said Federal coal leases; and that its mines are located approximately seven to fifteen miles from the mines of plaintiff in and around Monarch, Wyoming; and that both companies are the only producers of a certain low grade type of coal known as Sheridan area coal, the marginal nature of which, in combination with transportation expense, confines its distribution by both companies to approximately the same markets and the same types of customers. Attached hereto and made a part hereof is a graph marked Exhibit K, prepared from official sales figures showing the effect of the Big Horn Coal Company upon the market for Sheridan area coal.

Second. The defendant is the duly qualified Secretary of the Interior of the United States, holding unto himself certain powers, duties, and trusts thereunder and only by virtue of his office thereunder.

Third. This case arises under and by virtue of the laws of the United States, including the Act of June 11, 1946, 5 U. S. C. 1002, the Act of February 25, 1920, 30 U. S. C. 189, 201 et seq., and the Act of June 25, 1910, 43 U. S. C. 141 and regulations issued thereunder, more particularly Sec. 193.3 of Title 43, Federal Code
128 of Regulations. The amount in controversy exceeds $3000, exclusive of interest and costs.

Fourth. On January 24, 1934, the defendant's predecessor in office caused to be issued certain directive orders in letter form having the force and effect of statute, effectively withdrawing all public coal lands for coal leasing purposes except that certain public coal land for which could be shown an actual need which could not otherwise be reasonably met. Excerpted copies attached hereto and made a part hereof marked Exhibit A and Exhibit B.

Fifth. On January 6, 1944, one, the Big Horn Construction Company assigned its coal lease running from the State of Wyoming to one, the Big Horn Coal Company. This lease was dated December 2, 1943, although the cognizant officers of the State of Wyoming did not approve it until February 3, 1944. During the month of December, 1943, the Big Horn Coal Company

(a) began construction and development of their new mine on their State land,

(b) perfected their incorporation, and

(c) filed applications for a lease of adjoining Federal coal lands on the ground that such Federal land was necessary to the commencement of their new mine.

All three acts enumerated as a, b, and c above were made in concert and therefore necessarily part and parcel of each other.

Sixth. When the pendency of the Big Horn applications became known to the within plaintiff it filed protests against the issuance of the leases by the defendant to the said Big Horn Coal Company.

129 *Seventh.* On October 2, 1945, the defendant through the Undersecretary of the Interior, the Hon. Oscar L. Chapman, held a hearing at Denver, Colorado. At said hearing the Big Horn Coal Company urged its right to have defendant grant its application and award it a coal lease despite the aforementioned Regulation 193.3, Title 43, Code of Federal Regulations. The within plaintiff urged the disallowance of any award of said lease to Federal coal lands under said Regulation 193.3. Briefs and oral arguments were received from both the applicant Big Horn Coal Company and the within plaintiff.

Eighth. Some two years after the Big Horn Coal Company had first filed its lease application, the defendant, pursuant to legal requirement, published notice that for coal leasing purposes, he would receive offers and protests thereto on this same Federal coal land covered by the Big Horn application.

Ninth. On January 16, 1946, the Big Horn Coal Company offered to lease these public lands at a certain fixed rental. Such offer was not accepted by the defendant because of the aforementioned protests which were filed by the within plaintiff prior thereto. For this reason the defendant did not then make an award of the lease to the Big Horn Coal Company.

Tenth. On April 10, 1947, the defendant through his Director of the Bureau of Land Management, Hon. Fred W. Johnson, issued a certain writing denominated decision. Said decision contained the following:

(a) A conclusory and inferential attempt to make a finding of an old mine from a recital of so called hardship.

130 (b) Probative findings of fact which would necessarily compel as a matter of law a finding of a new mine.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need.

A copy of said decision is attached hereto and made a part hereof, marked Exhibit C.

Eleventh. On July 29, 1947, the defendant through his Undersecretary of the Interior, the Hon. Oscar L. Chapman, issued a writing denominated "Motion for Rehearing" which the within plaintiff had previously filed. Said decision contained the following:

(a) A reversal of the implicatory finding of an old mine previously made by the decision of April 10th although it reiterated the recital of so-called hardship in connection therewith.

(b) A finding that Big Horn was a new mine although a large and going one.

(c) A total omission of any finding that the coal to be mined from this Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need although it expressed the possibility that the within plaintiff and the Big Horn Coal Company could possibly exist.

A copy of the dismissal of said motion for rehearing is attached hereto and made a part hereof, marked Exhibit D.

Twelfth. On October 22, 1947, the defendant issued a certain writing denominated "Motion for the Exercise of Super-
131 visory Power." Said writing dismissed such motion which had been made previously by the within plaintiff. Said writing contained the following:

(a) An inferential restatement of the previous finding of a new mine in the denial of the motion for rehearing of July 29, 1947, and a repetition of the large going business finding.

(b) Probative findings of fact of a new mine by reference to the decision dated April 10, 1947, which would as a matter of law compel the finding of a new mine.

(c) A total omission of any finding that the coal to be mined from the Federal land could not otherwise be reasonably supplied.

(d) A total omission of any finding of need and complete elimination of the reference made in the dismissal of the "Motion for Rehearing" to a possibility of both mines existing.

A copy of said writing of October 22nd is attached hereto and made a part hereof, marked Exhibit E.

Thirteenth. Plaintiff further alleges that the within defendant is granted only restricted power and authority under the aforementioned Regulation 193.3 thereby limiting his discretion to grant a lease in the premises only upon the conditions that an applicant show a meeting of the criteria or requisites of Regulation 193.3. Therefore any issuance of Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company would be void and illegal because

(a) there has been no finding of the regulatory requisites, and

(b) there could be no finding of the regulatory requisites in the premises.

132 *Fourteenth.* Plaintiff further alleges that the effective withdrawal orders issued January 24, 1934, by the defendant's predecessor in office were the effective exercise through a proper officer under law of both the power and authority conferred by 43 U. S. C. 141, and the inherent withdrawal power and authority conferred by virtue of his office, withdrawing both formally

and informally the public land covered by the Big Horn lease applications, Buffalo Nos. 037885 and 039466 in the premises.

Fifteenth. Plaintiff further alleges that it is within the protected class established by the aforementioned Regulation 193.3 having the force and effect of statute.

Sixteenth. Plaintiff further alleges that the imminent threatened issuance of Buffalo leases Nos. 037885 and 039466 will irreparably and wrongfully damage to a large but unascertainable extent over and above $3,000.00, the business and trade of plaintiff in violation of the very manifest purpose of Regulation 193.3. Plaintiff alleges that it has already suffered loss of markets, loss of sales, loss of customers, loss of trade, and loss of profits resulting from the Big Horn Coal Company's operations on non-Federal lands. The granting of the aforementioned leases to the Big Horn Coal Company for its operation on Federal lands would result in irreparable damage in that further loss of markets, sales, customers, trade and profits, through increasing Big Horn's limited reserve, would result in an appreciable although unascertainable amount not readily compensable in damages, of an amount over and above $3,000.00. The issuance of said leases would impair plaintiff's entire business. For which reason plaintiff has no plain or adequate remedy at law. On information and belief the aforesaid contracts of lease are about to be executed and delivered by defendant to a foreign corporation which cannot be served in the District of Columbia with process in respect of such lease claimed by plaintiff to be illegal and in violation of its rights.

133 WHEREOF, the plaintiff prays:

(a) That this Court issue its temporary restraining order against the within defendant, his agents, deputies, employees and all persons acting in concert or participation with him or under his direction, enjoining and restraining them from issuing, signing, causing, suffering, or permitting the issuance of the aforementioned coal mining leases Buffalo Nos. 037885 and 039466 to the Big Horn Coal Company of Sheridan, Wyoming.

(b) That upon the hearing of motion for a preliminary injunction that the Court continue the temporary restraining order in effect as a preliminary injunction.

(c) That upon final hearing the Court permanently enjoin the defendant, his agents, deputies, employees, and all persons acting in concert or participation with him from issuing or attempting to issue, or signing, causing, suffering, or permitting the issuance of the aforementioned coal mining

leases Buffalo Nos. 037885 and 039466 to the Big-Horn Coal Company.

(d) That upon final hearing this Honorable Court may grant the plaintiff such other, further and different relief as may to the Court seem proper and just in the premises.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated: May 25, 1948.

134 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF FILING AMENDED PLEADING AS OF COURSE—Filed May 25, 1948

To: Ralph S. Boyd, Attorney for Defendant, Room 2131, Department of Justice, Washington 25, D. C.

Please take notice that plaintiff is filing an amended complaint as of course, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure on this the 25th day of May, 1948, a copy of which, together with additional Exhibits F through K, is served herewith.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

Dated: May 25, 1948.

Service of a copy of the foregoing notice is hereby acknowledged this 25th day of May, 1948.

RALPH S. BOYD,
Attorney for Defendant.

135 [Verification omitted]

136 EXHIBIT "A"

EXCERPT FROM LETTER OF JANUARY 24, 1934, FROM THE SECRETARY OF THE INTERIOR TO THE DIRECTOR OF THE BUREAU OF GEOLOGICAL SURVEY.

"The question of the advisability of withholding new leases of coal lands of the United States has been presented to me.

It is clear from the language of section 2 of the leasing act of February 25, 1920 (41 Stat. 437), and from the interpretation given to Section 13 of that act, relating to oil and gas, by the Supreme Court in the case of *United States* v. *Wilbur* 9283 U. S. 414, that it is within the discretionary authority of the Secretary of the Interior whether he shall issue any coal leases and coal prospecting permits. In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the operation of the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need for coal which cannot otherwise be reasonably purchased or obtained is shown.***

Hereafter the offering of coal lands for lease by competitive bidding or the granting of prospecting permits should not be recommended unless you have reliable information that there is an actual need for coal which cannot otherwise be reasonably met."

137 EXHIBIT "B"

EXCERPT FROM LETTER OF JANUARY 24, 1934, FROM THE SECRETARY OF THE INTERIOR TO THE COMMISSIONER OF THE GENERAL LAND OFFICE.

"In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order should be issued in effect suspending the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained.***

It is advisable that you in the first instance require lease applicants to show fully the need for additional production of coal."

138 EXHIBIT "C"

Decision

April 10, 1947

BIG HORN COAL COMPANY—Coal

Protest Dismissed. Evidence Required.

After due publication coal lease Buffalo 037885, embracing S½ sec. 31, T. 58 N., R. 84 W., 6th P. M., Wyoming, was offered at public auction at 10 a.m. on January 16, 1946. The original applicant, Big Horn Coal Company, was the only bidder to appear. Rental for the first lease year was tendered and a receipt issued. Under such circumstances, other things being equal, the right to a lease would have been awarded to that company at that time. However, in view of a number of protests filed prior to the auction date, no award was made.

The lands included in the Big Horn's coal lease application Buffalo 039466 (6th P. M., Wyoming, T. 57 N., R. 85 W., sec. 1, lot 4, SW¼NW¼, sec. 2, lot 1, SE¼NE¼; T. 58 N., R. 85 W., sec. 35, E½SE¼) have been found to be subject to lease but beyond that no action has been taken in the case, since the protests above noted were leveled against this application as well.

At present the Big Horn's coal properties are held under state lease.

The protests are numerous but of even tenor, several in fact being exact duplicates of one another. They are concerned primarily with two propositions: that proper application of section 193.3 of Title 43, Code of Federal Regulations, prohibits issuance of either lease and that strip mining as a form of enterprise is uneconomic and wasteful.

The regulation referred to (43 CFR 193.3) was adopted for the purpose of preventing ruinous competition in the coal industry within public land states and provides that leading units will be segregated and auctions authorized only upon "a satisfactory showing that an additional coal mine is needed and there is an actual need for coal which cannot otherwise be reasonably met." Protestants raised two issues in this connection: the Big Horn's lack of need for additional reserves and the absence of public need for an additional mine in the area concerned.

Apparently the initial stand with respect to adequacy of reserves has been abandoned in favor of a contention that the company opened its mine on state lands "with known inadequate reserves" in an effort to circumvent the provisions of the regulations cited. See page 17 of protestant's brief filed November 14, 1946, following the Denver hearings of October 2, 1946.

139 This office will not countenance any deliberate attempts to circumvent the above quoted regulation. The opening of a

mine on non-public lands only after an application has been filed for a lease on adjacent public land, will not, where such action is taken to effect the circumvention noted, be recognized as vesting any rights on which the granting of the lease may be based. However, the existence of such bad faith will not be presumed in the absence of clear proof thereof. In this instance, the Big Horn Company has alleged its complete bona fides and it is not believed that the evidence submitted by the protestants is sufficient to establish the contrary.

As to the question of need for an additional mine, it has long been established that Section 193.3 does not apply in cases where Federal leases seek additional lands as a reserve against imminent exhaustion of workable deposits in an existing mine. (Sec. 43, C. F. R. 193.15). The principle is the same whether that mine is on Federal, state or privately owned lands. The regulation was not intended to be and will not be invoked to drive a going concern out of business.

In the instant case, *the usual criteria for determining the need for a new mine* under section 193.3 do not apply because, at the time the Big Horn applications were acted on by the Department and the lease offered at public auction, that company was an active existing mine with a large annual production, and because of the further circumstances that (1) the Big Horn Company has been in operation for about three years and the evidence fails to disclose that its operation has jeopardized the continuance of the competing Sheridan-Wyoming mine (2) both companies apparently serve customers over a very large area embracing several states in which there are numerous other active mines, (3) both companies produce a type of coal which is not readily storable and which has limited uses.

Since this Department, by receiving Big Horn's application and acting favorably upon it, has encouraged that company to expand its means in the opening of a mine, it has the duty of issuing a lease unless it is shown that the company has acted in bad faith or that its operations have resulted in serious curtailment of Sheridan-Wyoming's production. The protestants have failed to establish either of these propositions as a fact. In addition, they have failed to show that strip mining is uneconomical and wasteful.

The protests are dismissed. This decision will become final 30 days from service of notice.

The Big Horn Coal Company is awarded the right to a lease under serial Buffalo 037885 and is granted 30 days from notice in which to file (1) the five attached lease forms after proper execution thereof, including initialing by the signing officer of the rider attached as section (2) (j) the fissionable materials reservation at the bottom of page 2, and the fair employment practices stipula-

tion stamped at the top of page 3, (2) a $10,000 corporate surety bond on or substantially in conformity with the attached form, and (3) its consent to accept a lease under its application Buffalo 039466 if offered at public auction at a minimum bonus of $10 per acre, subject to a royalty of 10 cents per ton, mine run, a minimum investment of $20,000 during the first three lease years, a minimum annual production of 10,000 tons, commencing with the fourth year of the lease, and the furnishing of a $10,000 bond, which
140 bond may be reduced to a minimum of $7,500 after the investment requirement has been met, to assure proper conditioning of the pit and to protect the remaining coal deposits on the land included in the application and adjacent land.

Failure to file the lease forms and bond required under 037885 will result in setting aside of the award and rejection of that lease application. Failure to submit the consent required under 039466 will result in rejection of that application.

The parties have a right to move for rehearing within the 30-day period prescribed above. (43 C. F. R. 221.81)

The district land office will serve notice hereof on the Big Horn Coal Company, Sheridan-Wyoming Coal Company, United Mine Workers of America, United Mine Workers Building, Washington, D. C., Local 230 of the United Mine Workers of America at Monarey, Wyoming, Montana Coal Operators Association, P. O. Box 1498, Billings, Montana, Coal Producers Association of Washington, 2010 Smith Tower, Seattle 4, Washington, Southern Wyoming Coal Operators Association, 704 Boston Building, Denver 2, Colorado, Utah Coal Operators Association, 709 Tribune Telegram Building, Salt Lake City 1, Utah, Rocky Mountain Coal Mining Institute, Equitable Building, Denver, Colorado, and Colorado and New Mexico Coal Operators Association, 814 Boston Building, Denver 2, Colorado.

Apr. 10, 1947 FRED W. JOHNSON,
Director.

Subject to the Department's consideration and disposition of motions for rehearing by the protestants under 43 CFR 221.81, the recommended conclusion that a lease be issued to the Big Horn Coal Company is Approved:

(sgd.) OSCAR L. CHAPMAN,
Under Secretary of the Interior.

141 EXHIBIT "D"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary—Washington

A-24645 July 29, 1947

"N"

Big Horn Coal Company, applicant: Buffalo 037885, 039466.

Sheridan-Wyoming Coal Company, et al., protestants: Protests against application for coal lease dismissed.

Motion for rehearing denied.

Motion for Rehearing

On April 10, 1947, the Department approved a decision of the Bureau of Land Management which dismissed the protests of Sheridan-Wyoming Coal Company and others against the granting of the application of the Big Horn Coal Company for a coal lease for certain lands in Wyoming. A motion for rehearing has been filed by Sheridan-Wyoming Coal Company, Coal Producers' Association of Washington, Montana Coal Operators' Association, Utah Coal Operators' Association, and Colorado and New Mexico Coal Operators' Association.

The record in this proceeding is relatively voluminous. Before the protests were dismissed, a hearing was held. Numerous exhibits, affidavits and counter-affidavits have been filed touching upon the details of innumerable matters, some of which are of questionable relevance. The entire matter, however, revolves, as all seem to agree, around the application of the following regulations of the Department:

> "The General Land Office[1] will make favorable recommendation that leasing units be segregated and that auctions be
142 authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." 43 CFR 193.3.

In essence, the protestants moving for rehearing contend that this is a case where a new coal mine has been opened which proposes to supply bituminous coal of a type, quality, kind and size which will tend to supplant in competitive market areas the coals which they have been shipping. The applicant denies this and asserts that it

[1] Now the Bureau of Land Management.

has a mine in operation and merely seeks additional lands in order that its mine may not be forced to close for lack of coal reserves.

The present operation of the applicant is conducted on sec. 36, T. 58 N., R. 85 W., Sheridan County, Wyoming. This land is apparently owned by the State of Wyoming. In 1941, Isaac Turner procured from the State a coal lease for sec. 36. Through a stripping operation employing a tractor and scraper, Turner produced a modest tonnage, some of which he hauled in his three trucks to the truck tipple of another mine for sale to truckers for resale and part of which he hauled directly to nearby consumers. In December 1942, the tractor and other equipment of the Turner mine were destroyed by fire and when Turner was unable to meet his commitments to the State, his lease was terminated.

Thereafter, on December 2, 1943, the persons interested in the Big Horn Coal Company procured from the State a coal lease.[2] On December 18, 1943, the prospective Big Horn Coal Company, then being incorporated, filed an application for a coal lease
143 of certain government lands adjoining sec. 36, and on December 21 submitted copies of its articles of incorporation showing it had come into existence on the preceding day. On August 24, 1945, the company applied for additional lands.

The Big Horn Coal Company commenced production in sec. 36 in February 1944, with 390 tons. This was followed by 34 tons in March, no tonnage in April, and then a constantly mounting tonnage for the remainder of the year so that total production for the year 1944 on a run of mine basis totaled 107,201 tons. For the year 1945, its production jumped to 264,722 tons and in 1946 it reached 483,576 tons.[3]

Harking back to the events of December 1943, the protestants cite the quoted departmental regulation. They assert that Big Horn started a new mine on sec. 36 with the full knowledge that the coal deposits were inadequate; that the company merely used the lease on the state land for the purpose of avoiding or evading the clear intendment of the departmental regulation. Big Horn, of course, takes the position that it assumed the operation of an existing mine

[2] The lease ran to the Big Horn Construction Company, because the Big Horn Coal Company was still in process of formation. As soon as it was formed, the lease for sec. 36 was assigned to it.

[3] These tonnage figures were obtained from reports filed by Big Horn Coal Company in the regular course of its business with the State Board of Equalization of Wyoming. Copies of the reports for the calendar years 1944 and 1945 comprised part of protestants' Exhibit 3, introduced at the hearing. A certified copy of the return for the calendar year 1946 was furnished to the Department directly by the Board at the request of the applicant.

and filed its application with the United States for the purpose of acquiring additional deposits to serve a mine already in existence.

Without attempting a definition of a mine, it seems clear that Big Horn did not simply continue the operation of the Turner mine. In essence, a new mine was created. Whereas the Turner mine had an insignificant production sold mainly to truckers over the
144 truck tipple of another mine, Big Horn launched into large production, installed new and modern equipment, including a large fleet of trucks for hauling coal to rail loading facilities, and constructed a new highway from its pits to a rail siding where it built a tipple capable of handling its tonnage for rail shipment. The Turner mine had served small local consumers and truckers who operated within the economic limits of the truck haul; but the Big Horn mine converted to shipments by rail and served large consumers of coal at distances far beyond those which could be reached by the trucked production of the Turner mine. True, both operations were of the stripping variety and both were conducted on the same section of land. But it is clear that the Big Horn operation was not a continuation or mere expansion of the Turner mine, either in terms of law, technology, or of economics. The Big Horn mine, a large rail shipping operation with new, modern equipment, happened to undertake production on the same land where formerly there had been a relatively tiny operation which shipped its modest tonnage to those who would buy or burn its products in the vicinity. It does not appear that the size, methods of mining, equipment used, mode of shipment, or consuming areas served were influenced by the happenstance that the Turner mine had once operated on the same land. In these circumstances, it cannot be said that the Big Horn Coal Company did not open a new mine on the state land. Thus, if consideration of this matter were to be limited to the events of December 1943, it would follow that the requested lease would not issue.

Thus to limit consideration of this case, however, would be to ignore events subsequent to December 1943. The facts are that since December 1943, without encroaching on federal lands,
145 the Big Horn Coal Company has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business. It would accommodate the expansion of an existing mine which is running out of coal reserves.

Such an application would not run counter to the regulation quoted above. The leading case interpretative of the regulation, and it has been strongly relied upon by the protestants at all stages of this proceeding, is *Carl T. Olson*, —— I. D. —— (A-24226, decided March 25, 1946), rehearing denied December 19, 1946. Olson had

applied for a lease for certain lignite lands. An investigation revealed that Olson proposed to open a new mine on federal lands to supply a market already adequately served by existing mines. In the course of its decision which denied the application, the Department noted that the quoted regulation was based on a "* * * policy founded in the long economic history of the coal industry and the dread effect of that menacing history upon the public interest." Both the public interest in the maintenance of a healthy bituminous coal industry and the interest of the government in the conservation and fruitful exploitation of its mineral properties were cited as reasons for sustaining the policy behind the rule. And Olson's application was rejected.

But the Department was also careful to note that its position "* * * as the proprietor of coal deposits on the public lands is not a dominant one in the control of the industry. However sagacious the policy of the Department in the disposition of such coal deposits, it cannot through this method alone enable the industry to
146 elude the press of natural economic forces." In the *Olson* case, as in cases which have followed it,[4] there was no question concerning the expansion of an existing, operating, going mine. In none of those cases had there been any substantial investment made in connection with operations on non-federal lands. None of them involved a situation where under leases issued by a State government, a mine operator had obtained markets, acquired customers, and established valuable good will, where machinery and equipment had been acquired and were being used currently in the business of mining a large tonnage of bituminous coal.

Thus, while the Department in the interpretation and application of its regulation has endeavored to prevent the creation of conditions of excessive competition, it has not undertaken to remove competition already established. To do so, as in this case, would result in the loss of individual investments in the mines to be closed. It would drive a mine out of business not because of poor management, or high cost of operations, or inability to meet competition in the market place, but because successful conduct of its business forced it to turn to federal lands for additional coal reserves. There is no good reason why the operator whose mine is on or adjacent to federally owned lands should for that reason alone be placed at a disadvantage in conducting and maintaining his business, or, conversely, why the operator of one mine should be accorded an advantage over another operator merely because, as a conse-
147 quence of successful operation, the latter needs coal deposits of the United States. As stated in the *Olson* case, the Depart-

[4] See Lyman Ray Cox, A-24405 (September 3, 1946), unreported; Andrew Mancotes, —I. D. — (A-24489, March 17, 1947); Frank Lilly, A-24582 (June 3, 1947), unreported.

ment will endeavor to prevent recurrence of the devastating economic conditions which have characterized the bituminous coal industry in the past, but it will not do so at the expense of the arbitrary termination of a lawful, going, useful business enterprise.

Further, the purpose of the rule is to assist in keeping in operation mines already in existence. To apply the rule as proposed by protestants would certainly and definitely close the Big Horn operation. On the other hand, to grant a lease to Big Horn leaves open the possibility of continued existence of both the applicant and its present competitors.

The motion for rehearing is denied.

(S.) Oscar L. Chapman,
Under Secretary of the Interior.

148 EXHIBIT "E"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary—Washington

A-24645 October 22, 1947

"N"

Big Horn Coal Company, applicant: Buffalo 037885, 039446.

Sheridan-Wyoming Coal Company, *et al.*, protestants; Protests against application for coal lease dismissed.

Motion for the exercise of supervisory power denied.

Motion for the Exercise of Supervisory Power

On July 29, 1947, the Department denied the motion of Sheridan-Wyoming Coal Company and others for a rehearing of a decision of the Bureau of Land Management, approved by the Department on April 10, 1947, which dismissed its protest against the applications of Big Horn Coal Company for coal leases on certain lands in Wyoming.

The facts are set forth at length in the decision approved April 10, 1947. To summarize them, Big Horn Coal Company obtained in December 1943, a coal lease from the State of Wyoming covering certain lands owned by the State. At about the same time the company filed an application for a coal lease of adjacent Federal lands and later filed a second application for additional adjacent Federal lands. Sheridan-Wyoming, joined by numerous others, protested the lease applications on the basis of the following regulation:

"The General Land Office [1] will make favorable recommenda-

[1] Now the Bureau of Land Management.

tion that leasing units be segregated and that auctions be
149 authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." 43 CFR 193.3.

The departmental decision of July 29, 1947, observed that Big Horn Coal Company "has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business." The decision concluded that "the Department will endeavor to prevent recurrence of the devastating economic conditions which have characterized the bituminous coal industry in the past, but it will not do so at the expense of the arbitrary termination of a lawful, going, useful business enterprise."

The motion for the exercise of supervisory power asserts that there exists an exigency demanding the exercise of such authority, and in support thereof recites the importance of a departmental interpretation of the quoted regulation favorable to the position of the protestant. But the same argument was presented to the Department in the motion for rehearing and was fully considered at that time.

Sheridan-Wyoming also contends that Big Horn Coal Company should have been aware at the time when it applied for a State lease that the coal reserves on State lands would be inadequate and that the availability of coal on the adjacent Federal lands would be shortly required if Big Horn Coal Company were to remain in business. But this is hindsight. The period of time which would
150 be required by Big Horn to exhaust coal deposits on the State lands could not have been foretold in December 1943, because at that time the company had no production history and no established outlets for its product upon the basis of which could be estimated the annual tonnage which it could produce and sell.

The protestant also contends that it is losing business to its new competitor and cites the number of shifts it lost during the first 7 months of 1947 because of a lack of market for its coals. Such statistics, while no doubt accurate, are at best inconclusive. The coals produced by Sheridan-Wyoming and by Big Horn are sub-bituminous, high in moisture, and almost wholly lacking in stocking qualities. Because of these factors consumers of this type of coal customarily buy it for immediate consumption and not for storage or reserve purposes. As a result, mines producing this sub-bituminous coal are unable in normal periods to maintain steady production throughout the year, but, on the contrary, they may even be compelled to close their operations during the hot months. Customarily, they produce at substantially less than capacity during the

warm months of the year. No evidence is offered by Sheridan-Wyoming to distinguish between shifts lost as a consequence of its normal production pattern and those which may be lost by reason of the competition as may be offered by Big Horn Coal Company. Sheridan-Wyoming does show that its annual production is declining from the extraordinary peak it attained during the war years. It is noted, however, that from the period 1931 through 1941 the company at no time attained an annual production in excess of 600,000 tons.[2] Nevertheless, its production for the calendar year 1946, of 828,269 tons indicates that it has thus far fairly with
151 stood any competition which it might have been offered by Big Horn Coal Company. And the prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence.

Sheridan-Wyoming states that in reliance upon the freedom from competition offered by the quoted regulations, it has made investments in mining equipment amounting to well over one million dollars. Yet, the affidavit of the president of the company, dated September 24, 1947, discloses:

> "• • • a true history of the indebtedness of the Sheridan-Wyoming Coal Company, Inc.;
>
> "The Sheridan-Wyoming Coal Company, Inc., was organized under the laws of the State of Delaware as of January 1, 1920. At that time there was authorized and issued First Mortgage Bonds in the amount of $3,500,000.00 bearing 7% interest, and Debentures in the amount of $3,500,000.00 bearing 7% interest. As of July 1, 1927 all of the Debentures were paid off with the exception of $1,760,000.00, for which Preferred Capital stock was issued to the holders of the debentures. As of July 1, 1927, the First Mortgage Bonds had been retired down to $1,733,000.00. As of July 1, 1927, a new First Mortgage Bond issue was authorized and issued in the amount of $3,000,000.00 bearing 6% interest. Out of this amount, $1,733,000.00 was used to pay off $1,733,000.00, which was the balance of the old bond issue not yet retired. The balance of the $3,000,000.00 was used in the purchase of new machinery for the further mechanization of the Company's mines. This $3,000,000.00 First Mortgage Bond issue was paid off in monthly instalments during the period July 1, 1927 and July 1, 1945, on which date the last instalment was paid."

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[2] The exact tonnages are tabulated by years on page 73 of the brief of protestants in support of their motion for rehearing.

A further affidavit of the same officer gives:

> 152 "* * * a complete statement as to the advances made to Sheridan-Wyoming Coal Company, Inc. by United States Distributing Corporation and The Pittston Company in all the years from January 1, 1920 down to the present time, namely: 1947;
>
> United States Distributing Corporation

	Amount	Paid
January 1, 1920	$ 56,250.00	August 3, 1920
December 28, 1936	22,200.00	December 31, 1938
The Pittston Company		
October 28, 1930	109,000.00	April 25, 1932
April 25, 1932	55,000.00	July 23, 1932
July 23, 1932	55,000.00	December 31, 1932
October 21, 1932	55,000.00	December 6, 1937
December 29, 1933	21,000.00	October 25, 1935"

It thus appears that substantial portions of the investment in the Sheridan-Wyoming operations were made long prior to 1934, the date of the regulation. Furthermore, even if the regulation were to be interpreted as broadly as Sheridan-Wyoming desires, the company would still face the risk of competition from mines opened and operated exclusively on non-Federal lands.

It is also suggested that the Department's interpretation of the regulation in its decision of July 29, 1947, will encourage evasion of the regulation by those who will seek to extend their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn.[3] The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal
153 reserves. What the decision would be were a case presented where a new mine opened on non-Federal lands with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding.

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[3] For photographs and a detailed description of Big Horn's mining techniques and equipment, see *Coal Age* (McGraw-Hill) October, 1947. pp. 102-106.

All persons interested in this matter have had abundant opportunity to present their facts and arguments in writing. Sheridan-Wyoming and Big Horn have taken full advantage of this opportunity. In addition, a hearing attended by both companies was conducted by the Under Secretary prior to the original decision in this case. The record appears to be complete. A further hearing would adduce only cumulative matter. Accordingly, the request of Sheridan-Wyoming for a hearing on its motion for the exercise of supervisory power is denied.

The motion for the exercise of supervisory power is denied. *Cobb* v. *Crowther*, 46 L. D. 473 (1918).

(Sgd.) J. A. KRUG,
Secretary of the Interior.

154 EXHIBIT "F"

Regulation 193.3 Federal Code of Regulations, Title 43, is as follows:

"Showing Required that an Additional Coal Mine Is Needed

The General Land Office *will* make favorable recommendation that leasing units be segregated and that auctions be authorized *only* in cases where there has been furnished a *satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met.*" . . . (Italics supplied.)

This regulation together with others relating to public mineral land, was published in pamphlet form by the Department of the Interior with a preface from which the following is excerpted:

(These) "regulations were codified and published pursuant to section 11 of the Federal Register Act, as amended (50 Stat. 304; 44 U. S. C., Sup. 311)."

• • •

"The Federal Register Act makes the documents which were codified and published pursuant thereto prima-facie evidence of the text of such documents and of the fact that they are in full force and effect on and after the date of publication."

155 EXHIBIT "G"

United States Department of the Interior

Office of the Secretary

Washington

A. 24226
Carl T. Olson March 25, 1946.

"N"

: Bismarck 024806
: Application for coal lease
: rejected
: Affirmed.

Appeal from the General Land Office

The Commissioner of the General Land Office rejected the application of Carl T. Olson for a coal lease embracing the NW¼ Sec. 21, T. 154 N., R. 100 W., 5th P. M., North Dakota, on the ground that the issuance of the lease would jeopardize production from mines already opened in the vicinity.

In his appeal from the decision Olson pointed out that, during the winter months many persons in the vicinity are unable to secure a supply of coal. He contends that in periods of severe weather this situation may involve local consumers of coal in a situation of substantial danger. Accompanying his appeal Olson submitted a petition signed by numerous residents in the vicinity of the lands involved which support his position.

Because of the representations made by Olson the Geological Survey conducted another examination into the situation. The report made as a result of this examination shows that any inability of the underground mine operators in the area to meet the demands of the local coal trade was temporary and due principally to labor shortage and to the fact that the coal users deferred the placing of their coal orders until cold weather as had been their practice when labor was plentiful. Moreover, the production from the nine underground mines in the area is supplemented by a large supply of coal available from the strip mine on coal lease, Bismarck 024602, of Edward F. Lovejoy which, by utilizing a skeleton crew, is capable of supplying the local as well as outlying
156 trade in nearby counties.

Olson also requests in his appeal "that this matter be considered as a question of government policy regarding the future development of the lignite coal industry in North Dakota, Montana and elsewhere in the United States" taking into consideration "possibilities in the use of lignite coal for the manufacture of

nylon and many chemicals and other by-products which may revolutionize the future production of many essential articles."[1]

While this Department is not entrusted with the establishment or administration of general governmental policy relating to the lignite coal industry, it is apparent that applicant's request calls for reconsideration of the applicable rule of this Department respecting the lease of coal lands in situations of this type.

Lignite coal, by general accepted definition, differs from standard bituminous coal principally in respect to friability and to moisture, B. T. U. and other factors revealed by proximate analysis. Substantially any use to which lignite coal may be put, however, is also able to be met by bituminous coal; and to the extent that lignite coal enters into markets which may be served by bituminous coals, it is subject to the same economic stresses as apply to bituminous coals. Periods of depression in the bituminous coal industry weigh heavily upon lignite coal producers. Despite minor structural and chemical differences in the composition of the two coals the economies of the two industries are interwoven into a single fabric; each affects directly the course of the other. It is apparent therefore that the same considerations which are applicable to the lease of additional bituminous coal lands are also relevant
157 to the lease of additional lignite coal lands.

The policy of the Department in this regard dates back to 1934:

> "The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." (43 Code Federal Regulations 193.3); cf. 54 I.D. 350 (1934).

The reasons prompting the establishment of this policy were founded in the long economic history of the coal industry and the dread effect of that menacing history upon the public interest. The condition of the coal industry

> ". . . 'for many years (had) been indeed deplorable.' Due largely to the expansion under the stimulus of the Great War, 'the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons' to meet a demand 'of less than 500,000,000 tons.' In connection with this increase in surplus

[1] Applicant does not represent that the coal it proposes to produce would find its way into such byproduct markets.

production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. . . . Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields." Appalachian Coals, Inc. v. United States, 288 U. S. 344, 361 (1933).

". . . Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in
158 extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines. . . . The plight of the industry was not merely a menace to owners and to mine workers; it was and had been long a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy." Cardozo, J., dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 330, 331 (1936).

". . . The investigations . . . are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition 'had been degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 395 (1940).

Nor is there a reason to believe that the condition of excess production capacity has disappeared from the bituminous coal industry during the recent period of the war. It is true that there were recurring periods of severe shortages of coal. These shortages, however, appear to have been attributable, chiefly to a deterioration in the supply of available, experienced mine workers. At the

present time there is no firm reason for believing that with the restoration of an adequate labor supply and the elimination
159 of depleted domestic, industrial and railroad reserves of coal, the industry will not again be confronted with a recurrence of the situations above described.

Were the departmental rule to rest alone upon the general public interest it would be a reasonable and appropriate measure. But it finds firmer support. With respect to coal deposits upon the public domain, the Government assumes the capacity of a proprietor who desires the fruitful exploitation of the natural resources upon his lands.

Overproduction in the bituminous coal industry strikes at the prosperity of producers large and small, old and new. Overhead costs are slashed and then, as the effects of overproduction accumulate, impairment settles upon the ability of producers to meet fixed commitments. As a royalty owner the Government suffers. Finally, with both capital and income exhausted, many producers give up the losing battle. In the light of conditions which exist in the industry, no market exists in which these producers can dispose of their mines and recover even a portion of their investments. Again the Government is the loser, for an abandoned mine frequently deteriorates beyond the point where it will be profitable within the foreseeable future to reopen it for the recovery of the merchantable coal left in the ground. Props give way, roofs collapse, water fills the entries and passageways, rails and equipment waste away in rust and corrosion. To the consumers of the Nation good coal once potentially available through operation of the mine is lost and to the Government the royalties it might have brought are gone.

It is true, of course, that the position of the Department as the proprietor of coal deposits on the public lands is not a dominant one in the control of the industry. However sagacious the policy of the Department in the disposition of such coal deposits, it cannot through this method alone enable the industry to
160 elude the press of natural economic forces. But this does not mean that the Department should knowingly contribute to an unfortunate situation. On the contrary, the course of wisdom would indicate that it should carefully refrain from accentuating a condition which may bring depression upon a great industry and those who depend upon it for their livelihood. This consideration, taken in conjunction with the position of the Department as a present potential royalty owner, indicates that revision of the departmental rule at this time would be harmful to the lignite coal industry and not in the public interest.

The decision of the Commissioner is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

161 EXHIBIT "H"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary

Washington, December 19, 1946

"N"

: Bismarck 024806
: Motion for rehearing
: Motion denied

MOTION FOR REHEARING

The Department affirmed a decision of the General Land Office[1] which rejected the application of Carl T. Olson for a coal lease embracing the NW ¼ sec. 21, T. 154 N., R. 100 W., 5th P. M., North Dakota. The ground for the decision was a finding that there is already sufficient productive capacity in the vicinity to meet the demands of the market which Olson proposes to serve. In such case, the rule of the Department precludes the granting of an additional coal lease (43 Coal Federal Regulations 193.3). Further, upon examination of the reasons which gave rise to the establishment of the rule, the decision concluded that it would be contrary to the public interest to abandon this rule.

Olson has moved for a rehearing. He contends that appearances are misleading as to the productive capacity of the mines in the vicinity, since they all produce a lignite coal which deteriorates readily, weathers poorly and is generally unsuited to stocking and storage. For this reason, he asserts, residents in the vicinity must postpone purchase of their coal supplies until winter; and because the capacity of the local mines is inadequate to meet this
162 seasonal peak demand, nearby farmers suffer during intense winter weather as a result of making fruitless trips to mines which are unable to supply their orders at such critical times.

In view of these contentions, the Department has caused another investigation to be made of the capacity of the coal mines in the vicinity involved here. This investigation shows that the nearby Lovejoy strip mine (Bismarck 124602) has been developed to the point where, with other nearby mines, it will be able to meet the peak needs of persons residing in the vicinity. In addition, since the decision of the Department on appeal, truck and wagonloading facilities at the Lovejoy mine have been expanded to accommodate

[1] Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876, 7776).

the extraordinary demands of customers during harsh weather. It thus appears that there is now sufficient coal-producing capacity in the vicinity to avoid recurrence of the conditions described by Olson.

Olson does not challenge the reasons which support the departmental rule, supra, but he suggests that the reasons are inapplicable to this particular area since it is economically isolated from the remainder of the coal industry and consequently, is not affected by, nor does it affect, the rest of the industry. The causes and consequences of productive over-capacity as described in the departmental opinion are as valid in an isolated area as on a national scale. More, when conditions of overproduction becomes manifest in one area, normal channels of distribution for producers in that area become lost, and the press for outlets extends the deadening effects of the overproduction into other nearby and, in extreme cases, distant areas.

The motion for rehearing is denied.

(Sgd.) G. GIRARD DAVIDSON,
Assistant Secretary of the Interior.

163 EXHIBIT "I"

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Secretary

Washington, September 3, 1946.

A. 24405
Lyman Ray Cox

"N"
: Salt Lake City 2 '269
: Coal-lease application rejected
: Affirmed.

Appeal from the General Land Office[1]

On the ground that there was no satisfactory showing that an additional coal mine is needed in the district in which the land involved is located, the Commissioner of the General Land Office denied the application of Lyman Ray Cox for a coal lease embracing land in T. 14 S., R. 7E., S. L. M., Utah. From this decision the applicant has appealed. He states that the land he seeks has been partially developed as a coal mine by others in the past; that an additional supply of coal is required in the vicinity; and that the

[1] Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

policy of the Department is improper if it rejects applications for coal leases where it is not shown that an additional supply of coal is needed.

The regulation of the Department under which the application was rejected is as follows:

> "The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be
> 164 reasonably met." (43 Code Federal Regulations 193.3)

This regulation was promulgated in 1934. The propriety of continuing the regulation was recently examined in detail and it was concluded that repeal of the regulation would be harmful both to the bituminous coal industry and to the public interest. (Carl T. Olson (A. 24226) March 25, 1946, unreported.) The application advances nothing which would warrant revision of the regulation.

Because of the applicant's representation that an additional supply of coal is needed, a further field examination was made. The report of the examination discloses that lack of demand has caused abandonment of a number of mines in the vicinity. It emphasizes that there is not sufficient market to give reasonable working time to the remaining small mines and that, within a year, large shipping mines in the vicinity will be working part-time. This augurs an economic condition which may well force the abandonment of more small mines with consequent waste of the Nation's natural resources. The Department will not grant applications to open new mines which will depress an already wasteful condition.

The decision of the Commissioner is affirmed.

(Sgd.) G. GIRARD DAVIDSON,
Assistant Secretary.

165 EXHIBIT "J"

Copy

UNITED STATES DEPARTMENT OF THE INTERIOR

General Land Office

District Land Office, Buffalo.
Serial No. 037167.

Mining Lease of Coal Lands under Act of February 25, 1920

This indenture of lease, entered into, in quintuplicate, this 24th day of September A. D. 1943, by and between the United States of America, acting in this behalf by the First Assistant Secretary of

the Interior, party of the first part, hereinafter called the lessor, and Sheridan-Wyoming Coal Company, Inc., of Monarch, Wyoming, party of the second part, hereinafter called the lessee, under, pursuant and subject to the terms and provisions of the act of Congress, approved February 25, 1920 (41 Stat. 437), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," hereinafter called the "act."

WITNESSETH:

That the lessor, in consideration of the rents and royalties to be paid and the covenants to be observed as hereinafter set forth, does hereby grant and lease to the lessee the exclusive right and privilege to mine and dispose of all the coal in, upon, or under the following described tracts of land, situated in the State of Wyoming, to wit: SW¼ Sec. 31, W½W½ Sec. 32, T. 57 N., R. 84 W., SE¼, S½SW¼ Sec. 25, all of Sec. 36, T. 57 N., R. 85 W., 6th P. M., containing 1,200 acres, more or less, together with the right to construct all such works, buildings, plants, structures and appliances as may be necessary and convenient for the mining and preparation of the coal for market, the manufacture of coke or other products of coal, the housing and welfare of employees, and subject to the conditions herein provided, to use so much of the surface as may be reasonably required in the exercise of the rights and privileges herein granted.

166 Section 1. That the lessor expressly reserves:

(1a) The right to permit for joint or several use such easements or rights of way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(1b) The right to lease, sell, or otherwise dispose of the surface of said lands or any part thereof under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in the mining and removal of the coal therein, and to lease other mineral deposits in the lands, under the provisions of said act.

(1c) The full power and authority to carry out and enforce all the provisions of Section 30 of said act to insure the sale of the production of said leased lands to the United States and to the public at reasonable prices, to prevent monopoly; and to safeguard the public welfare.

Section 2. The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

(2a) To invest in actual mining operations, development, or improvements upon the land leased, or for the benefit thereof, the sum of Sixty Thousand Dollars, of which sum not less than one-third shall be so expended during the first year succeeding the execution of this instrument and a like sum each of the two succeeding years, unless sooner expended; and submit annually, at the expiration of each year for the said period, an itemized statement of the amount and character of said expenditure during such year.

(2b) To furnish a bond in the sum of $10,000 conditioned upon the expenditure of the amount specified in (2a) hereof and
167 upon compliance with all the other terms of the lease. (In case of a $10,000 bond, a bond in the sum of $5,000 may be substituted after the investment requirement has been met.)

(2c) To pay as an annual rental for each acre or part thereof covered by this lease, the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth year, and $1 per acre for the sixth and each succeeding year during the life of this lease, all such annual payments of rental to be made to the register of the United States Land Office of the district in which said land is situated on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid.

(2d) To pay to such register a royalty of 10 cents a ton (until December 31, 1946, and 8 cents a ton for the balance of the initial term, on every ton of 2,000 pounds of coal mined during the first 20 years succeeding the execution of this lease. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

(2e) To determine accurately the weight of all coal mined from the leased premises, and to accurately enter the weight or weights thereof in due form in books to be kept and preserved by the lessee for such purpose.

(2f) To furnish quarterly, within 30 days after the expiration of the quarter, a written report covering such quarter, certified under oath by the superintendent of the mine, or by such other agent having personal knowledge of the facts as may be designated by the lessee for such purpose, showing the number of tons of 2,000 pounds of coal mined during the quarter, the character and quality thereof, amount of coal and products and by-products thereof disposed of and price received therefor, amount of coal and its products in storage or held for sale, and amount used in operations under this lease.

168 (2g) Also to furnish annually, and at such other times as the Secretary of the Interior may require, in the manner and

form prescribed by the Secretary of the Interior, plat, map, or tracings showing all development work and improvements upon the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon the leased lands, a statement as to the amount and grade of coal produced and sold, and amount received therefor by operations hereunder, and, if a corporation, the amount of capital stock and list of its stockholders.

(2h) To keep at the mine office clear, accurate, and detailed maps, on a scale not more than 200 feet to the inch, in the form of horizontal projections on tracing cloth, of the workings in each coal bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Each map of the workings in any coal bed shall show the thickness of the coal and of partings, and the dip and strike of each bed at intervals of 500 feet or less; the location of all openings connecting such bed with the workings in any other bed, or with any adjacent mine, or with the surface; the location of all entries, gangways, rooms, or breasts, and all other mine openings, shafts, airways, appliances, and devices, constructed or placed in the mine or any of the workings thereof; and such maps shall also show the elevation relative to sea level or a Government survey corner of the principal points of the various beds and workings.

Blue prints or reproductions in duplicate of the maps required as aforesaid shall be furnished the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before the first day of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by lessor.

169 (2i) That, beginning with the fourth year of the lease, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, the lessee shall mine and pay a royalty on not less than 60,000 tons of coal per year, unless on application and showing made, operations shall be suspended for not exceeding six months at any one time, pursuant to section 7 of the act; or unless the lessee shall pay the royalty less rent, on such minimum amount of coal, for one year in advance, in which case operations may be suspended for that year.

(2j) That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the leased premises without the written consent of the lessor being first had and obtained.

Section 3. It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period, but in case the lessee be dissatisfied with the rate of royalty or other terms and conditions provided in Section 6 (b) and 6 (c) hereof

Section 4. This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe, unless the laws of the State where the leased land or deposits are situated otherwise provide, in which case such State laws control:

(4a) The lessee shall carry out and observe regulations prescribed by the Secretary of the Interior and in force at the date hereof relative to (1) reasonable diligence, skill, and care in the operation of said property in accordance with approved methods and practices; (2) the prevention of undue waste; (3) the safety and welfare
170 of miners; and (4) insuring the fair and just weighing or measurement of the coal mined by each miner.

(4b) And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money of the United States, and shall permit such miners and other employees full and complete freedom of purchase but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators, or fuses; and shall not require or permit miners or other employees, except in case of emergency, to work underground for more than eight hours in any one workday, and shall not employ any boy under the age of 16 years, or any girl or woman without regard to age in any mine below the surface.

Section 5. And the lessee also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives, with all proper and necessary assistants, may at all reasonable times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations.

(5a) And also shall permit the lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from any or all of same, if desired.

(5b) And also shall permit the lessor or its lessees or transferees, with the approval of the lessor, to make and use upon or under the leased lands any workings necessary for freeing any other mine

from water or gas, or extinguishing fires, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder; provided, that any such use by a transferee or another lessee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

171 (5c) And also shall, at the termination of this lease, as the result of forfeiture thereof, pursuant to paragraph (6d), deliver up to the lessor the lands covered thereby, including all fixtures, machinery, improvements, and appurtenances other than strictly personal property, situate on any of said lands, in good order and condition, so as to permit of immediate continued operation to the full extent and capacity of the leased premises.

Section 6. It is further mutually understood and agreed as follows:

(6a) That the lessor may, in writing, waive any breach of the covenants and conditions contained herein, except such as are required by the act, but any such waiver shall extend only to the particular breach so waived, and shall not limit the rights of the lessor with respect to any future breach; nor shall the waiver of a particular cause of forfeiture prevent cancellation of this lease for any other cause, or for the same cause occurring at another time.

(6b) The lessee may, on consent of the Secretary of the Interior first had and obtained, surrender and terminate this lease upon payment of all rents, royalties, and other debts due and payable to the lessor and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary of the Interior that the public interest will not be impaired; and the lessee may with like consent surrender any legal subdivision of the area included within the lease; but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mines or productive works or permanent improvements on the lands covered hereby.

(6c) That on the termination of this lease, pursuant to the last preceding paragraph, the lessor, his agent, licensee, or
172 lessee shall have the exclusive right at the lessor's election to purchase at any time within six months thereafter, at the appraised value, any or all buildings, machinery, tools, or other property placed by the lessee in or on the lands leased hereunder, save and except all underground timber and such other supports and structures as are necessary for the protection and preservation of the mine, which shall be and remain a part of the realty without further consideration or compensation; that the purchase price to

be paid for said buildings, machinery, equipment, tools, or other property to be purchased as aforesaid shall be fixed by appraisal of three disinterested and competent persons (one to be designated by each party hereto and the third to be selected by the two so designated), the valuation so determined by the three or a majority of them to be conclusive and binding upon both parties; that pending such election to purchase within the said period of six months none of the buildings or other property shall be removed from their normal position; that if such valuation be not requested or the lessor shall affirmatively, in writing, elect not to purchase within said period of six months, the lessee shall have the privilege of removing said buildings, machinery, equipment, tools, and other property within 90 days after being notified in writing by the lessor that the said lessor does not elect to purchase any or all of the buildings, machinery, equipment, tools, or other property, and in case of failure to so remove the said property within 90 days after receipt of such notice, then said buildings, machinery, tools, or other property shall become the property of the United States.

(6d) If the lessee shall fail to comply with the provisions of the act or make default in the performance or observance of any of the terms, covenants, and stipulations hereof, or of the
173 general regulations promulgated and in force at date hereof, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease as provided in Section 31 of the act, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor might otherwise have.

Section 7. It is further covenanted and agreed that, should the lessee fail to take prompt and necessary steps to prevent loss or damage to the mine, property, or premises, or danger to the employees, the lessor may enter on the premises and take such measures as may be deemed necessary to prevent such loss or damage or to correct the dangerous or unsafe condition of the mine or works thereof, which shall be at the expense of lessee.

Section 8. It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Section 9. It is also further agreed that no member of or delegate to Congress or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and

the provisions of Section 3741 of the Revised Statutes of the United States and Sections 114, 115, and 116 of the Codification of the Penal Laws of the United States, approved March 4, 1909
174 (35 Stat. 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

In Witness Whereof

THE UNITED STATES OF AMERICA,
(s.) By OSCAR L. CHAPMAN,
Assistant Secretary of the Interior, Lessor,
SHERIDAN-WYOMING COAL CO., INC.,
(s.) By D. H. PAPE,
Its President, Lessee.

Witnesses:
R. E. MCNALLY,
T. A. WANERUS.

175 EXHIBIT "K"

Filed May 25, 1948. Harry M. Hull, Clerk.

176 THE UNITED STATES OF AMERICA, ss:
The President of the United States of America.

To the Honorable the Justices of the District Court of the United States for the District of Columbia,

GREETING:

Whereas, lately in the District Court of the United States for the District of Columbia, before you or some of you, in a cause between Sheridan-Wyoming Coal Company, Inc., plaintiff, and Julius A. Krug, defendant, Civil No. 4465-47, wherein the judgment of the said District Court entered in said cause on the 17th day of November, 1947, is in the following words, viz:

"This cause came on to be heard on the defendant's motion to dismiss the complaint; and after consideration thereof it is by the Court, this 17th day of November, 1947,

"ADJUDGED, ORDERED and DECREED that the defendant's motion be, and it hereby is, granted and that the complaint be, and it hereby is, dismissed on the ground that it fails to state a claim upon which relief can be granted.

"ALEXANDER HOLTZOFF,
"Justice."

177 as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

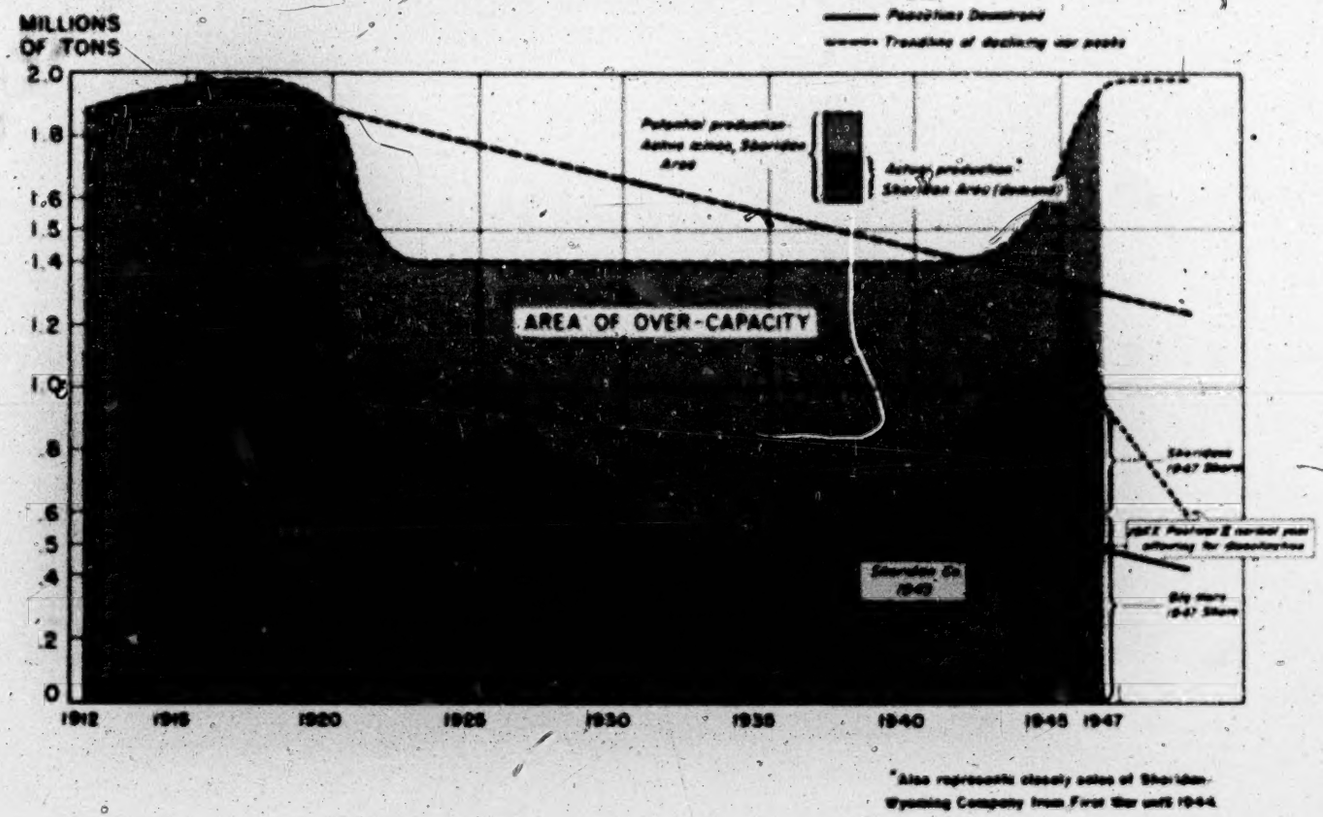
LIBRARY
SUPREME COURT, U.S.

Addition to record in case No. 60 at page 84.

EXHIBIT "K"

INTERRELATION BETWEEN PRODUCTION AND DEMAND FOR SHERIDAN AREA COAL

1912 to 1946 through Normal and Two War-Boom Periods showing resultant Downward Trend.



*Also representative closely sales of Sheridan-Wyoming Company from First War until 1944.

178 And Whereas, in the term of January, in the year of our Lord one thousand nine hundred and forty-eight, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed, with leave to the District Court, however, to entertain a motion by plaintiff, if it be so advised, to amend its complaint, and with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper, provided that such motion be made within 10 days after the mandate in this cause is filed in the District Court, and the temporary injunction issued by this Court herein on December 4, 1947, is therefore hereby continued in effect for ten days after the mandate in this cause is filed in the District Court. Schaff v. R. W. Claxton, Inc., 79 U. S. App. D. C. 207, 144 F. 2d 532 (1944).

March 29, 1948.

179 You, Therefore, Are Hereby Commanded that such execution and further proceedings be had in said cause not inconsistent with the order of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the 24th day of May, in the year of our Lord one thousand nine hundred and forty-eight.

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

180 [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER ON MANDATE—Filed June 9, 1948.

Plaintiff having appealed to the United States Court of Appeals for the District of Columbia from the judgment dismissing the complaint entered in this cause on November 17, 1947, and said Court having issued its mandate dated the 24th day of May, 1948, wherein it was ordered, adjudged and decreed that such judgment be affirmed, with leave to this Court to entertain a motion by plaintiff to amend its complaint, and with leave to this Court to dispose of such motion, if made, in such manner as in its discretion seems proper, provided

that such motion be made within ten days after the mandate is filed in this Court, and such mandate having been received and filed by the clerk of this Court on the 25th day of May, 1948.

Now upon the mandate of the United States Court of Appeals for the District of Columbia, dated the 24th day of May, 1948, it is this 8th day of June, 1948,

ORDERED, ADJUDGED AND DECREED that the judgment entered in this cause on the 17th day of November, 1947, be and it is in all respects, affirmed, and this Court resumes jurisdiction of the cause, to dispose of any timely motion by plaintiff for leave to
181 amend its complaint, in such manner as seems proper to this Court in its discretion, in accordance with the mandate.

ALEXANDER HOLTZOFF,
Justice.

Approved as to form:

——— ———, ——— ———, Attorneys for plaintiff.
RALPH S. BOYD, Attorney for defendant.

182 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., PLAINTIFF,

v.

JULIUS A. KRUG, Secretary of the Interior, DEFENDANT

MEMORANDUM—Filed July 6, 1948

The original complaint in this case was dismissed by this Court on defendant's motion. The United States Court of Appeals for the District of Columbia affirmed that decision but granted leave to this Court to entertain a motion by plaintiff for leave to amend its complaint. Plaintiff undertook to amend its complaint as of right by serving a copy of its proposed amendment on defendant's counsel and giving the original to the Clerk of this Court for filing. Thereafter, plaintiff filed a motion for leave to file the amended complaint and the case came on to be heard on that motion. The Court has carefully considered that motion. The Court has also considered, in the light of the opinion of the Court of Appeals in this case, the proposed amendments which were not contained in the original complaint. It is the opinion of this Court that the proposed new matter adds nothing material to the claim and issue presented by plaintiff in its original complaint and, hence granting

leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation. Accordingly, the motion for leave to amend the complaint is overruled.

F. DICKINSON LETTS,
Justice.

July 6th, 1948.

183 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

ORDER OVERRULING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND CONTINUING TEMPORARY INJUNCTION—Filed July 6, 1948

This cause came on to be heard on plaintiff's motion for leave to file an amended complaint and on plaintiff's motion for a preliminary injunction pending final hearing, and the Court having taken the motions under advisement, by consent of counsel a temporary injunction pending consideration of the motions under advisement was entered on June 4, 1948. The Court having considered plaintiff's motions, it is by the Court this 6th day of July, 1948,

ORDERED, that plaintiff's motion for leave to file an amended complaint be overruled and that plaintiff's motion for a preliminary injunction be denied, and

IT IS FURTHER ORDERED, that the temporary injunction entered herein on June 4, 1948, be and it is hereby extended and continued for ten days from this date in order to permit plaintiff to apply to the United States Court of Appeals for the District of Columbia for review of this order.

/s/ F. DICKINSON LETTS,
Justice.

No objection as to form:

STEPHEN J. MCMAHON, JR., T. PETER ANSBERRY, Attorneys for Plaintiff.

184 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

NOTICE OF APPEAL—Filed July 7, 1948

Notice is hereby given that the Sheridan-Wyoming Coal Company, Inc., plaintiff herein, hereby appeals to the United States Court of Appeals for the District of Columbia, from that part of the order entered herein denying plaintiff's motion for leave to amend its complaint entered herein on July 6, 1948.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

July 7, 1948.

CC: RALPH S. BOYD,
Department of Justice.

185 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted]

NOTICE OF INTENTION TO APPLY ALLOWANCE OF SPECIAL APPEAL —Filed July 7, 1948

Notice is hereby given this seventh day of July, 1948, that the Sheridan-Wyoming Coal Company, Inc., plaintiff herein, hereby intends to apply for allowance of a special appeal to the United States Court of Appeals for the District of Columbia from that part of the order of this Court entered on the sixth day of July, 1948, in favor of Julius A. Krug, defendant herein, which denies plaintiff's motion for leave to amend its complaint, against said plaintiff, the Sheridan-Wyoming Coal Company, Inc.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Plaintiff.

July 7, 1948.
CC: RALPH S. BOYD,
Department of Justice.

186 Service of a copy of the foregoing is hereby acknowledged this 12th day of July 1948.

ROGER P. MARQUIS,
Attorney for Appellee.

187 Clerk's Certificate to foregoing transcript omitted in printing.

188 IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Docket No. 9946

[File endorsement omitted]

SHERIDAN-WYOMING COAL COMPANY, INC., Monarch, Wyoming, APPELLANT

v.

JULIUS A. KRUG, Washington, D. C., APPELLEE

MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL OR IN THE ALTERNATIVE MOTION FOR CONTINUANCE OF TEMPORARY RESTRAINT PENDING CONSIDERATION OF MOTION FOR PRELIMINARY INJUNCTION

Filed July 13, 1948

Comes now the appellant and moves that this Honorable Court grant a temporary injunction pending appeal for the following reasons:

On the sixth day of July, 1948, the District Court of the United States, by Mr. Justice Letts, entered an order overruling appellant's motion for leave to file an amended complaint and continuing the temporary restraint which the District Court had previously granted until ten days from the entry of such order, in order to allow appellant an opportunity to appeal to this court. *This temporary restraint will expire on the sixteenth day of July, 1948.*

I

Temporary restraint in this cause was originally granted by the District Court by its Chief Justice on November 4, 1947, when appellant filed its original complaint for an injunction.

The District Court, by Mr. Justice Holtzoff, thereafter dismissed the complaint but continued temporary restraint for seven days to allow appellant to apply to this court for further temporary restraint pending appeal.

189 This Court then continued the District Court's temporary restraint pending consideration of appellant's motion for temporary injunction pending appeal. Later, this court, after an

extensive hearing, granted the motion for temporary injunction pending appeal.

After affirmance by this Court, and modification of its judgment to allow appellant opportunity to amend, the mandate of this Court was stayed *for thirty days upon the motion of the appellee*, while appellee considered applying for certiorari.

The stay was further extended, upon the motion of the appellant, for a period of ten days after the mandate was received by the District Court. Then, the District Court, by Mr. Justice Letts, temporarily issued its restraint pending disposition of a motion for leave to amend the complaint. Upon the denial thereof, that Court again extended its temporary restraint for an additional ten days as indicated *supra*.

II

The District Court, by Mr. Justice Letts, denied appellant's motion for leave to amend its complaint upon the sole ground, stated in its memorandum opinion, dated July 6, 1948, that:

> "The proposed new matter adds nothing material to the claim and issue presented by the plaintiff in its original complaint, and, hence, granting leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation."

It is submitted this ruling was clearly erroneous. Appellant was thus denied an opportunity even to plead a certain Federal coal lease which it holds and other facts pertinent thereto which this Court had previously indicated were requisite to appellant's standing to sue. This Court in its opinion stated:

190 *"Appellant's second point is that it is, and has been for some time, a lessee of federal coal lands;* that the regulation above mentioned, having the force of a statute, was part of its lease; and that this combination of circumstances created in it a property right which was threatened with invasion by the new lease. Appellant says that the claim thus depicted falls within the doctrine of the Chicago Junction Case and kindred cases and under the general considerations which controlled the Court in deciding Federal Communications Commission v. National Broadcasting Co. and similar cases. *Those cases involved claimed protection against threatened invasion of special interests, amounting to property rights, created by statute, or valid regulation, in persons in certain circumstances, or those having, or granted, contracts or licenses.* Under the decisions, those persons were entitled to sue. *The difficulty*

with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease." (emphasis supplied)

Under the District Court's order the appellant would be prevented from reaching the merits of this cause as outlined in the opinion of this Court by a "procedural" ruling, erroneous both in substance and as a technical matter.

III

The appellee can show no pressing urgency for discontinuance of temporary restraint. It did make such attempt before this Court on Appellant's previous motion for temporary injunction pending appeal. At that time, appellee introduced an affidavit claiming great hardship and difficulty in having to await orderly legal disposal of this case. That affidavit, which this Court passed upon, was patently erroneous as shown by appellant's opposing affidavit.

Appellee has not again attempted to claim pressing urgency. *Appellee's thirty day stay while considering certiorari from a favorable decision of this Court indicates the absence of urgency.*

191 In actual fact, Big Horn is not urgently in need of the coal due both to the summer season and the realization of the collapse of the Sheridan market predicted in appellant's graph of last November.

IV

The expiration of temporary restraint would enable the appellee to issue the leases in question. The Big Horn Coal Company, a non-resident of the District of Columbia, upon whom service cannot be obtained, then becomes a necessary party under the doctrine of *Brady* v. *Work*, 263 U. S. 435. Therefore, this Court would lose jurisdiction before a decision on the merits. Appellant thus loses all remedy the instant restraint lapses. Appellant would suffer irreparable harm by the probable destruction of its entire business. Moreover, the novel and important questions of substantive law raised by the amended complaint would remain unsettled.

CONCLUSION

Wherefore, appellant respectfully prays that its motion for temporary injunction pending appeal be granted or in the alternative that the temporary restraint of the District Court which will expire on the 16th day of July, 1948, be continued temporarily

pending further consideration and a hearing by this Court of the motion for temporary injunction pending appeal.

Respectfully submitted,

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Appellant

Dated: July 10, 1948.

Service of a copy of the foregoing is hereby acknowledged this 10th day of July 1948.

(S.) ROGER P. MARQUIS,
Atty. for Appellee.

192 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9946

[File endorsement omitted]

[Title omitted]

Before STEPHENS, C. J., and PRETTYMAN, J.

ORDER CONTINUING TEMPORARY INJUNCTION, ETC.—Filed July 16, 1948

On consideration of appellant's motion for a temporary injunction pending appeal herein, and of appellee's objections thereto, and of appellant's reply, it is

ORDERED by the Court that the temporary injunction entered in this cause in the District Court on June 4, 1948, be, and it is hereby, continued in effect pending the final disposition of this appeal by this court, or pending the further order of this court in this case.

It is FURTHER ORDERED by the court that this appeal be advanced and set down for hearing in October, or as soon thereafter as the docket of the court will permit.

Dated July 16, 1948.

Per Curiam.

193 UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9946

[Title omitted]

[File endorsement omitted]

MOTION TO DISMISS APPEAL—Filed July 16, 1948

Julius A. Krug, appellee above-named, moves this Court to dismiss the appeal sought to be taken on July 7, 1948. This motion is made for the following reasons:

Appellant above-named has moved this Court for a temporary injunction pending appeal and has filed a petition for special appeal. The facts of the case and the authorities which show that appellant had no right to appeal from the order of July 6, 1948, are stated in appellee's memorandum in opposition to the motion for temporary injunction pending appeal and to the petition for special appeal. For the reasons there stated, it is submitted that the attempted appeal as of right should be dismissed.

Respectfully,

ROGER P. MARQUIS,
Attorney, Department of Justice,
Attorney for Appellee.

July 1948.

Service of a copy of the foregoing is hereby acknowledged this 16th day of July, 1948, at 11:50.

(Sgn.) STEPHEN MCMAHON,
Attorney for Appellant.

194 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 9932; 9946, April Term, 1948

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

v.

JULIUS A. KRUG, APPELLEE

ORDER

On consideration of the joint motion of the parties herein to allow the record in this case on previous appeal No. 9704 to be made a

part of the record of the present appeal No. 9946 and application for special appeal No. 9932, It is

ORDERED by the Court that the motion be, and it is hereby, granted.

PER CURIAM.

Dated September 3, 1948.

United States Court of Appeals for the District of Columbia. Filed Sep. 3, 1948. Joseph W. Stewart, Clerk.

195 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9946, April Term, 1948

[Title omitted]

[File endorsement omitted]

Before: EDGERTON, CLARK and WILBUR K. MILLER, *JJ.*

ORDER DENYING MOTION TO DISMISS APPEAL—Filed Sept. 17, 1948

On consideration of appellee's motion to dismiss the appeal herein, of the objections to the motion, and of the reply to objections, It is

ORDERED by the Court that the motion be, and it is hereby, denied.

PER CURIAM.

Dated September 17, 1948.

196 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9932, April Term, 1948

[Title omitted]

[File endorsement omitted]

Before: EDGERTON, CLARK and WILBUR K. MILLER, *JJ.*

ORDER DENYING SPECIAL APPEAL, ETC.—Filed Sept. 17, 1948

On consideration of the petition for allowance of a special appeal from the order of Mr. Justice F. Dickinson Letts entered in this cause on July 6, 1948, in the District Court of the United States for the District of Columbia, and of the record filed in appeal No. 9704, between the same parties, and of respondent's objections to the petition for allowance of special appeal, It is

ORDERED by the Court that a special appeal from said order be, and it is hereby, denied.

PER CURIAM.

Dated September 17, 1948.

197 IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9946

[Title omitted]

[File endorsement omitted]

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE—Filed Oct. 30, 1948

Comes now the Big Horn Coal Company, a Wyoming corporation, and moves this Court for leave to file its brief in this appeal as *amicus curiae*. As grounds for this motion the Big Horn Coal Company shows to the Court as follows:

The appellant, Sheridan-Wyoming Coal Company, seeks by this litigation to cause the appellee, Secretary of the Interior Krug, to be enjoined from executing a lease to Big Horn Coal Company of certain Federal coal lands in Wyoming. The Big Horn Coal Company is in urgent need of the additional coal lands in question and its business operations are being curtailed and seriously jeopardized by the actions of the appellant, which actions have already had the effect of causing the execution of the lease to be delayed for approximately 2¾ years beyond the time when said lease would, but for such actions, have normally been executed.

It is the purpose and desire of the Big Horn Coal Company, in its brief *amicus curiae*, to consider and discuss certain factors that may be regarded by the Court as important to a proper understanding and determination of the appeal, and which are not believed to be fully discussed and considered in the brief of the appellee.

Copies of the brief as *amicus curiae*, which Big Horn Coal Company asks this Court for leave to file, are submitted herewith.

WARD E. LATTIN,
1126 Woodward Building,
Washington, D. C.
Attorney for Big Horn Coal Company, as Amicus Curiae.

W. C. FRASER,
637 Omaha National Bank Bldg.,
Omaha, Nebraska,
Of Counsel.

198 SERVICE OF MOTION OF BIG HORN COAL COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Copies of the motion of Big Horn Coal Company for leave to file brief amicus curiae in case No. 9946, together with copies of the

brief sought to be filed, were mailed to T. Peter Ansberry, 815 15th Street, N. W., Washington, D. C., Stephen J. McMahon, Jr., 1025 Connecticut Avenue, N. W., Washington, D. C. (Attorneys for Appellant), and to A. Devitt Vanech, Assistant Attorney General, Department of Justice, Washington, D. C. (Attorney for Appellee), this 29th day of October, 1948.

WARD E. LATTIN,
1126 Woodward Building,
Washington, D. C.
Attorney for Big Horn Coal
Company, as Amicus Curiae

199 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9946, October Term, 1948

[Title omitted]

[File endorsement omitted]

ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE—Filed Nov. 20, 1948

On consideration of motion of Big Horn Coal Company, a Wyoming corporation, for leave to file a brief as *amicus curiae* in the above-entitled cause, to which appellant consents, It is

ORDERED by the Court that the motion be, and it is hereby, granted.

PER CURIAM.

Dated November 20, 1948.

200 UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File endorsement omitted]

No. 9946

SHERIDAN-WYOMING COAL COMPANY, INC., APPELLANT,

v.

JULIUS A. KRUG, Department of Interior, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia)

Argued December 9, 1948. Decided January 31, 1949

MR. T. PETER ANSBERRY and MR. STEPHEN J. MCMAHON, JR., for *appellant*.

Mr. Roger P. Marquis, Attorney, Department of Justice, with whom Mr. A. Devitt Vanech, Assistant Attorney General, and Mr. John C. Harrington, Attorney, Department of Justice, were on the brief, for *appellee*.

Mr. Ward E. Lattin filed a brief on behalf of Big Horn Coal Company as *amicus curiae*, urging affirmance.

Before: Edgerton, Clark and Prettyman, *JJ*.

Opinion—Filed Jan. 31, 1949

Prettyman, *J.*:

The Sheridan-Wyoming Coal Company, Inc., brought a civil action in the District Court of the United States for the District of Columbia to restrain the Secretary of the Interior from delivering to the Big Horn Coal Company certain leases for federal coal lands. The Secretary moved to dismiss. The court granted that motion upon the grounds that plaintiff had no standing to sue and that the power of the Secretary to grant coal leases is discretionary, not subject to judicial review, and not diminished or restricted by his regulations, specifically Section 193.3 of Title 43, Code of Federal Regulations. Sheridan-Wyoming appealed.

Upon the appeal, this court agreed with the District Court that merely as a member of the coal industry threatened with a new competitor, Sheridan-Wyoming had no standing to sue, citing *Alabama Power Co.* v. *Ickes*[1] and similar cases. But Sheridan-Wyoming argued that it was a lessee of federal coal lands, that the regulation mentioned (43 Code Fed. Regs. § 193.3) was part of its lease,
201 and that it thus had a property right threatened with invasion by the proposed leases to Big Horn, relying upon *Baltimore & Ohio R. R.* v. *United States*[2] and similar cases. As to that contention, this court said:[3]

> "The difficulty with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease."

This Court, therefore, refused to consider the contention and affirmed the judgment of the District Court but in the mandate gave that court authority to entertain a motion to amend the complaint. Such a motion was presented, offering an amended complaint which contained an allegation that Sheridan-Wyoming was a lessee of fed-

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[1] 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).

[2] 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317 (1924).

[3] Sheridan-Wyoming Coal Co. v. Krug, 83 U. S. App. D. C. —, 168 F. 2d 557, 558 (1948).

eral coal lands, attaching a copy of the lease, and otherwise alleging the facts concerning the lease theretofore presented in the course of the argument in this court. The District Court denied the motion to amend, saying:

> "It is the opinion of this Court that the proposed new matter adds nothing material to the claim and issue presented by plaintiff in its original complaint and, hence, granting leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation."

It seems to us perfectly clear that the proposed amendment did add something new and material to the claims and issue presented by the plaintiff. The status of one suing merely as a member of an industry to enjoin threatened competition, and the status of one claiming a property right by contract, threatened with invasion, are wholly different.[1] The original complaint in the present case rested on the former status. The amended complaint rested also upon the latter. Moreover, we think this court made clear in its opinion upon the first appeal that plaintiff's rights as a member of the coal industry and its rights as owner of a property right by contract were different. We held that as the former it had no standing to sue. But we pointed out that under the *Baltimore & Ohio* and kindred cases persons claiming protection against threatened invasion of property rights, created by contract upon valid regulations, were entitled to sue.

It is true that the language in the mandate from this court upon the first appeal was, in part: "with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper". It is elementary that a trial court has wide discretion in respect to amendments which are not of right. But that discretion may be controlled by the opinion of this court, and the discretion mentioned in the mandate was likewise circumscribed by that opinion. Moreover, such discretion as the trial court had, or was given, could not deprive this court of its appellate jurisdiction over decisions of that court upon questions of law. The Supreme
202 Court, in *United States* v. *Lehigh Valley R. R.*,[2] had for consideration a refusal of a trial court to permit an amendment in a matter governed by the opinion of the Supreme Court in a prior appeal. The Court held the refusal to be "an absolute abuse of discretion" and expressed the extent of its meaning by adding

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[1] *Compare* Alabama Power Co. v. Ickes, *supra*, with Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929).

[2] 220 U. S. 257, 271, 55 L. Ed. 458, 463, 31 S. Ct. 387 (1911).

"even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate."

We now adhere to our original view that plaintiff's status as a lessee of federal coal lands under a lease which incorporated a valid regulation governing such leases, would be materially different from its status as a mere member of the coal industry. Since the District Court denied the motion to amend upon a contrary view of that proposition, and upon that contrary view alone, its judgment must be reversed.

Both appellant and appellee have now twice argued fully before this court the nature of Sheridan-Wyoming's status as lessee under its lease and the regulation which is involved. This litigation has already consumed a long time. Therefore, in remanding the case for further proceedings, we deem it to be in the interest of justice that we now express our view upon that question for the guidance of the District Court in those further proceedings.

We must first have a careful understanding of what is shown by the record to have occurred. Those events relate to Sheridan-Wyoming's lease, the Departmental regulation, Big Horn's application for a lease, and the Secretary's proposed disposition of that application.

Sheridan-Wyoming's Lease. The coal lands involved are in and around Monarch, Wyoming. The coal is a low-grade sub-bituminous, known as Sheridan area coal. It is high in moisture and almost wholly lacking in stocking qualities. Consumers buy it for immediate use, and mines producing it are unable to maintain steady production throughout the year.

Sheridan-Wyoming was organized in 1920. Substantial portions of the investment in its operations were made long prior to 1934, when the regulation hereinafter discussed was promulgated. It had been a lessee of federal coal lands for many years. Its present lease was executed in September, 1943.

The Regulation of the Department. In 1933 or thereabouts the Department became concerned over the plight of the coal industry upon its lands "and the dread effect of that menacing history upon the public interest." The leasing act[6] gave the Secretary discretionary power to issue coal leases and to withdraw coal lands from lease.[7] In 1934 he wrote letters to the Director of the Bureau of Geological Survey and to the Commissioner of the General Land Office containing identical language as follows:

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[6] Act of Feb. 25, 1920, 41 Stat. 437.

[7] United States v. Wilbur, 283 U. S. 414, 75 L. Ed. 1148, 51 S. Ct. 502 (1931).

"In the present situation of the coal industry it is desirable that very few, if any, new coal leases or prospecting permits be issued.

"Taking into consideration, however, that there may be some cases where new small coal mines for local needs are advisable and that there may also be cases where leases for shipping mines should not be denied, it is thought that no general order
203 should be issued in effect suspending the leasing act as to new coal leases and prospecting permits. It is believed that substantially the same result can be reached by declining to offer coal lands for lease or to grant prospecting permits unless an actual need is shown for coal which cannot otherwise be reasonably purchased or obtained."

Thereupon the Secretary promulgated the following regulation:

"The General Land Office will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met."

This regulation was duly published in the Federal Register as part of the Code of Federal Regulations.[8]

Subsequently the regulation was construed by the Department thus: "In such case [i.e., where there is already sufficient productive capacity in the vicinity to meet the demands of the market], the rule of the Department precludes the granting of an additional coal lease (43 Code Federal Regulations 193.3)."[9] In the proffered amended complaint, it is alleged that that ruling represents the heretofore uniform rule of the Department for fourteen years.

Big Horn's Application. The Big Horn Coal Company was incorporated on December 20, 1943. Prior to that incorporation, the persons interested had, on December 2, 1943, procured from the State of Wyoming a lease on certain coal lands belonging to that State, which had theretofore been leased to one Turner, who was unable to meet his commitment. On December 18, 1943, still prior to formal incorporation, the Big Horn people applied for a lease of federal lands adjoining those under lease to Sheridan-Wyoming. The complaint alleges that this application was on the ground that federal land was necessary to the commencement of the new mine.[10]

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[8] 43 Code Fed. Regs. § 193.3 (1938).

[9] *Carl T. Olson*, A. 24226 (Dec. 19, 1946). A similar ruling was made in *Lyman Ray Cox*, A. 24405 (Sept. 3, 1946).

[10] Allegations in the complaint must be treated as true for purposes of the motion to dismiss.

Big Horn did not allege or attempt to show that there was or is a market need for additional coal, which showing is the one requisite for a new lease prescribed by the regulation. Big Horn proceeded to mine its State of Wyoming properties and thereby developed a large business.

The Secretary's Proposed Disposition of Big Horn's Application. The Secretary took no action on Big Horn's application for a federal lease until two years later, when he offered that lease at public auction. Big Horn was the only bidder, and its tender of the first year's rental was accepted. But a number of protests were filed, and no further action was taken for more than a year. Then the protests were dismissed and Big Horn was awarded the right to the lease. In denying the protests, the officials of the Department said, in part:

> "This office will not countenance any deliberate attempts to circumvent the above quoted regulation. The opening of a mine on non-public lands only after an application has been filed for a lease on adjacent public land, will not, where such
> 204 action is taken to effect the circumvention noted, be recognized as vesting any rights on which the granting of the lease may be based. However, the existence of such bad faith will not be presumed in the absence of clear proof thereof. In this instance, the Big Horn Company has alleged its complete bona fides and it is not believed that the evidence submitted by the protestants is sufficient to establish the contrary.
>
> "As to the question of need for an additional mine, it has long been established that Section 193.3 does not apply in cases where Federal lessees seek additional lands as a reserve against imminent exhaustion of workable deposits in an existing mine. (Sec. 43, C. F. R. 193.15). The principle is the same whether that mine is on Federal, state or privately owned lands. The regulation was not intended to be and will not be invoked to drive a going concern out of business.
>
> "In the instant case, the usual criteria for determining the need for a new mine under section 193.3 do not apply because, at the time the Big Horn applications were acted on by the Department and the lease offered at public auction, that company was an active existing mine with a large annual production, and because of the further circumstances that (1) the Big Horn Company has been in operation for about three years and the evidence fails to disclose that its operation has jeopardized the continuance of the competing Sheridan-Wyoming mine (2) both companies apparently serve customers over a very large area embracing several states in which there are numerous other active mines, (3) both companies produce a type of coal which is not readily storable and which has limited uses."

The protestants, including Sheridan-Wyoming, moved for rehearing. The motion was denied. The Department said, in part:

> "In these circumstances, it cannot be said that the Big Horn Coal Company did not open a new mine on the state land. Thus, if consideration of this matter were to be limited to the events of December 1943, it would follow that the requested lease would not issue.
>
> "Thus to limit consideration of this case, however, would be to ignore events subsequent to December 1943. The facts are that since December 1943, without encroaching on federal lands, the Big Horn Coal Company has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business. It would accommodate the expansion of an existing mine which is running out of coal reserves."

Referring to the ruling on the regulation in the *Olson case*,[11] the Department said:

> "In the Olson case, as in cases which have followed it, there was no question concerning the expansion of an existing, operating, going mine. In none of those cases had there been any substantial investment made in connection with operations on non-
> federal lands. None of them involved a situation where
> 205 under leases issued by a State government, a mine operator had obtained markets, acquired customers, and established valuable good will, where machinery and equipment had been acquired and were being used currently in the business of mining a large tonnage of bituminous coal."

Sheridan-Wyoming and the protestants then moved for the exercise of the supervisory power of the Secretary. The motion was denied in a memorandum by the Secretary, in which he said, in part:

> "It is also suggested that the Department's interpretation of the regulation in its decision of July 29, 1947, will encourage evasion of the regulation by those who will seek to expand their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn. The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal reserves. What the decision would be were a case

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[11] *Supra* note 9.

presented where a new mine opened on non-Federal lands with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding."

It is not claimed by the Secretary that a market need for additional coal has been shown or suggested.

The foregoing are, in brief, the facts upon which Sheridan-Wyoming's status to sue, as established by the complaint, the amended complaint, and the exhibits thereto, must be determined. Preliminary to the affirmative considerations which lead to a conclusion, we note that the ground upon which the Secretary proposes to issue the Big Horn lease in spite of his regulation, is singularly unimpressive. The reason he assigns is that Big Horn has a large, established business and so, although the lease would not have been granted as of the date of the application, it must now be granted. The fact is that Big Horn made its application even before it was incorporated, and all its big business has been built up with full knowledge that it had no federal lease. It has now, according to the Secretary's view, hoisted itself by its own bootstraps.

The Secretary does not claim that the regulation is invalid, and he does not propose to withdraw it or modify it. He does not claim that its sole recited condition for a new lease has been met. He does not deny the construction which he has hitherto given it. He proposes to write an exception into it. He says that it was not intended to apply to the granting of a new lease to an existing company with a large business which alleges that it needs this coal to perpetuate that business. No such exception can be gleaned from the terms of the regulation or from fourteen years of administrative construction.

Sheridan-Wyoming, on the other hand, also has an investment and a good business, which it has established in reliance upon and not in the teeth of the Departmental regulation. The proposed exception would strip from that lease one of its most valuable conditions, a condition established by the Secretary for the declared purpose of protecting then-existing lessees against ruin.

206 The "good faith" of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized and, according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed venture. It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.

The propositions which lead to a conclusion may be succinctly stated. They are:

1. The regulation of the Secretary (43 Code Fed. Regs. § 193.31) was valid. He had power to withdraw lands from leasing and so could impose the conditions upon which he would lease.[12]

2. The regulation was published in the Federal Register as one of general applicability and legal effect.[13] It had the force and effect of statute. As such, it was binding upon the Secretary until repealed or modified by him.

Judge Sanborn's opinion in *Germania Iron Co.* v. *James*[14] and Commissioner (now Circuit Judge) Frank's opinion in *Consumers Power Company et al.*[15] should be read in full upon this point. Other authorities are cited below.[16]

3. The regulation meant what the Secretary held it to mean. When he promulgated it, he said it reached "substantially the same effect" as a withdrawing of the land from leasing. Thereafter he consistently held that it precluded the grant of leases to these lands unless market need for additional coal was shown.[17]

4. The lease was expressly made subject to the Mineral Leasing Act. Its introductory clause recited that it was "under, pursuant and subject to the terms and provisions of the act of Congress, approved February 25, 1920 (41 Stat. 437), entitled . . ." The terms of a statute according rights and immunities to a vendee of government property are part of the obligation of the deed made pursuant to it.[18] A lease is no less a contract than is a deed. Thus

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[12] 41 STAT. 438 (1920), 30 U. S. C. A. § 201; 41 STAT. 450 (1920), 30 U. S. C. A. § 189; United States v. Wilbur, *supra* note 7; United States v. Midwest Oil Co., 236 U. S. 459, 475, 59 L. Ed. 673, 682, 35 S. Ct. 309 (1915); United States v. Morrison, 240 U. S. 192, 60 L. Ed. 599, 36 S. Ct. 326 (1916); Stockley v. United States, 271 Fed. 632 (C. C. A. 5th 1921).

[13] 49 STAT. 501 (1935), 44 U. S. C. A. § 305; 49 STAT. 503 (1935), as amended 44 U. S. C. A. § 311.

[14] 89 Fed. 811 (C. C. A. 8th 1898).

[15] 6 S. E. C. 444 (1939), PIKE AND FISHER, ADMIN. LAW DEC. 33f.11-1.

[16] United States v. Perkins, 79 F. 2d 533 (C. C. A. 2d 1935); United States v. Dunton, 288 Fed. 959 (S. D. N. Y. 1923); Sibray v. United States, 282 Fed. 795 (C. C. A. 3d 1922).

[17] *Supra* note 9.

[18] Wood v. Lovett, 313 U. S. 362, 370, 85 L. Ed. 1404, 61 S. Ct. 983 (1941), and cases there cited.

while the regulation was not by specific terms incorporated in the lease, as a valid existing provision of law it was one of the conditions of the lease. It determined that contract to be one of a limited number of leases, a far different contract from a mere lease in an unrestricted potential number. The value of this condition is apparent. The regulation was promulgated to create that value, in the public interest, in the sense that it was designed to prevent the disaster of unrestricted leasing. The background and reason
207 for the regulation were recited in the Secretary's memorandum in the *Olson* case, included in this record. He quoted descriptions of the coal industry from the opinions in *Appalachian Coals, Inc.* v. *United States*[19] and *Sunshine Coal Co.* v. *Adkins*,[20] and from Mr. Justice Cardozo's dissent in *Carter* v. *Carter Coal Co.*[21] To Sheridan-Wyoming the restriction meant that its commitments to mine the coal and to pay the royalties, and to make the prerequisite investments and expenditures, were protected against destruction of the market by the "anarchy" which had theretofore existed, and were supported by governmental adjustment of production to market needs.

5. Sheridan-Wyoming, as possessor of a valuable right, created by contract in the presence of valid and binding restrictive regulations, has standing to sue to protect that right.[22] The prevention of a breach of a restrictive provision in a contract is one of equity's most usual functions.[23]

The Secretary has wide discretion in the granting of federal mineral leases, but he has no discretion to violate or ignore an existing general departmental regulation which established one of the conditions upon which he entered into a contract of lease.

The judgment of the District Court is, therefore, reversed and the case remanded with instructions to that court to permit the filing of the proffered amended complaint and to deny defendant's motion to dismiss in so far as that motion rests upon the ground that plaintiff

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[19] 288 U. S. 344, 361, 77 L. Ed. 825, 53 S. Ct. 471 (1933).

[20] 310 U. S. 381, 395, 84 L. Ed. 1263, 60 S. Ct. 907 (1940).

[21] 298 U. S. 238, 330-331, 80 L. Ed. 1160, 56 S. Ct. 855 (1936).

[22] *Frost* v. *Corporation Commission*, *supra* note 4; and cases there cited. The proposition is much discussed in the opinions in recent cases involving radio broadcasting licenses. *Federal Communications Comm'n* v. *National Broadcasting Co.*, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943); *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875 (1942); *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940).

[23] POMEROY, EQUITY JURISPRUDENCE § 1341 (5th ed. 1941).

has no standing to sue. The temporary injunction heretofore issued by the District Court on June 4, 1948, will be continued in effect until final disposition of the action by that court.

Reversed and remanded for further proceedings in accordance with this opinion.

Dissenting Opinion

Edgerton, J., *dissenting*: Our former judgment was that the District Court might grant or deny a motion to amend the complaint "as in its discretion seems proper." That judgment became final long ago. This court now reverses it and requires the District Court to grant the motion. This reversal seems to me not only inconsistent with orderly procedure but probably beyond our authority.

I agree with the District Court that the proposed amendment of the complaint would add nothing material. On the former appeal we did not undertake to decide that question. I think the Department regulation on which this court now relies was not intended to be, did not appear to be, and was not a term or condition of appellant's lease. Its apparent purpose and effect were not to increase the rights of lessees, but to limit the expectations of applicants for leases. It did not purport to control the discretion of the Secretary in making leases, but only that of his subordinates in making "favorable recommendations." Moreover the United States is a necessary party when suit is brought to prevent the leasing of its lands.

208-211 UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1949

No. 9946

[File endorsement omitted]

Sheridan-Wyoming Coal Company, Inc., appellant,

vs.

Julius A. Krug, appellee

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Before: Edgerton, Clark and Prettyman, *JJ.*

Judgment—Filed January 31, 1949

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment—of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

PER CIRCUIT JUDGE PRETTYMAN.

Dated January 31, 1949.

Dissenting opinion by Circuit Judge Edgerton.

212 Clerk's Certificate to foregoing transcript omitted in printing.

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213 IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 60

JULIUS A. KRUG, PETITIONER

v.

SHERIDAN-WYOMING COAL COMPANY, INC., RESPONDENT

Stipulation and Addition to Record

Filed July 12, 1949

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of the petition for a writ of certiorari, the printed record shall include the temporary injunction issued on June 4, 1948, by the District Court of the United States for the District of Columbia, a certified copy of said temporary injunction being attached hereto.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

STEPHEN J. MCMAHON, JR.,
Counsel for Respondent.

JULY 12, 1949.

214 Clerk's Certificate to following paper omitted in printing.

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215 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4465-47

SHERIDAN-WYOMING COAL COMPANY, INC., MONARCH, WYOMING, PLAINTIFF

v.

JULIUS A. KRUG, WASHINGTON, D. C. DEFENDANT

Temporary Injunction Pending Disposition of Motion for Preliminary Injunction and Motion for Leave to File Amended Complaint

Filed June 4, 1948

This cause having come on for hearing upon plaintiff's motion for leave to file amended complaint and the same having been argued by counsel, and the Court having decided to take the matter under advisement and further consideration before disposing of said matter,

And a temporary restraining order having been issued from this Court by its Chief Justice on November 4, 1947, and this Court having continued its temporary restraint by Mr. Justice Holtzoff after dismissal of the complaint until plaintiff had opportunity to take its appeal to the United States Court of Appeals for the District of Columbia, and that Court having issued a temporary injunction pending appeal on December 4, 1947, which temporary injunction was extended ten days beyond receipt of the mandate by this Court, which extension expires this date, the fourth day of June 1948,

216 Now, therefore, it is hereby ordered that you, Julius A. Krug, the defendant herein, be and you are hereby temporarily restrained and enjoined from signing, causing, suffering, or permitting the issuance to the Big Horn Coal Company of the coal mining leases known as Buffalo 037885 and Buffalo 039466, involved in this case, and that all persons acting in concert or participation with you and your agents, deputies, attorneys, and employees, are hereby temporarily restrained and enjoined from issuing, signing, causing, suffering, or permitting the aforementioned coal mining leases, Buffalo 037885 and 039466, to be issued to the Big Horn Coal Company.

This order restraining and enjoining the issuance of the aforementioned coal mining leases shall remain in effect until the

further order of this Court upon the disposition of the aforementioned motion for leave to file amended complaint and if the motion for leave is granted then until plaintiff's motion for preliminary injunction is disposed of by the Court, and in the event the motion for leave is granted then, the motion for preliminary injunction shall be further heard within ten days thereafter.

F. DICKENSON LETTS,
Justice.

Dated: June 4th, 1948.
Approved:
T. PETER ANSBERRY,
Attorney for Plaintiff.
RALPH S. BOYD,
Attorney for Defendant.
217 [File endorsement omitted.]

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218 SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 60

Order Allowing Certiorari

Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 863479 919

Office - Supreme Court, U. S.
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JUL 11 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 60.

JULIUS A. KRUG, Department of Interior, *Petitioner*,

v.

SHERIDAN-WYOMING COAL COMPANY, INC.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

T. PETER ANSBERRY,
STEPHEN J. MCMAHON, JR.,
Attorneys for Respondent.

Of Counsel:

SETH W. RICHARDSON;
DAVIES, RICHBERG, BEEBE,
BUSICK & RICHARDSON.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 60.

JULIUS A. KRUG, Department of Interior, *Petitioner*,

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SHERIDAN-WYOMING COAL COMPANY, INC.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

INTRODUCTION.

Respondent respectfully directs this Court's attention to the fact that this cause has been argued twice, at extraordinary length, before the bar of the Court of Appeals; that has, moreover, been argued in numerous and extensive hearings in chambers. The first opinion appears at pages to 4 and the second at pages 78 to 86 of the Record. omparing the petition with the second opinion, it will be vident that few of the Court's points are challenged, *and ot a single one of its twenty-two supporting case authorities are either cited or discussed.* So altered and transformed is the factual picture and legal background, it

might well be concluded that the petition had been filed in a different case.

Does petitioner's brief constitute an accurate and full statement of the facts and issues here involved? If one looks no further than his presentation, it seems incredible that any court could make so erroneous a decision. Typical is petitioner's conclusion that "the decision below means that all persons who have received coal leases since 1934 have standing to attack in court the issuance of leases which might possibly result in competition with existing mines"[1]. (Pet. 16)

Moreover, the assertions of fact, contrary to plain allegations of the amended complaint, on which the petition rests, namely (1) an exception to the Regulation for bigness—large "existing", if new mines—and (2) that the Regulation, as previously construed, binds only his subordinates, —belong in an answer, not in a petition.

Respondent, therefore, requests the indulgence of this Court in making a response more lengthy and detailed than is normally necessary or advisable, in order that the Court may fully comprehend the actual issues, exhaustively considered and correctly decided below.

COUNTER STATEMENT.

Fifteen years ago, the government of the United States, pursuant to a general policy of preventing the creation of unneeded competition in the chronically sick coal industry, promulgated a valid statutory Regulation (43 C. F. R. 193.3) requiring a showing and a finding of consumer need before the issuance of additional Federal coal leases. Thus, in times of prosperity, uneconomic new coal enter-

[1] Of course, as the record demonstrates, only if the Secretary breaches his own statutory regulation flagrantly—by a novel and isolated attempt at issuance of a lease without the finding required by its own standard—consumer need—can, and should, anyone sue; and then only Federal lessees faced with direct irreparable damage thereby.

prises on the public lands would be avoided. Current overproduction indicates the timeless wisdom of this policy.

The petitioner has long and profitably leased Federal coal lands to respondent. (R. p. 49, 50). Respondent has expended great sums in reliance on the restrictive Regulation as an inducement. Yet petitioner now proposes to create new Federal competition for respondent by granting certain leases to a newly established and adjoining state mine, the Big Horn Coal Company. This he would do in the teeth of the Regulation requiring a showing and finding of consumer need, although he found none; this he would do while reaffirming the regulation and its wisdom; and despite the withdrawal of the lands for this public purpose.

While the export coal industry until recently enjoyed a post-war boom, the Monarch area coal industry has, due to its low grade, non-exportable, substandard, non-storable coal, almost immediately suffered a return to its long-term drastic consumption downtrend which had been relieved in forty years only by the two war booms. (See Graph, Exhibit F, Original and Amended Complaints, R. 37).

Respondent, Sheridan-Wyoming Coal Company, leases certain Federal coal lands in and around Monarch and Sheridan, Wyoming. It operates the Monarch mine upon such land which was leased in 1943. Previously it held Federal coal leases and operated coal mines in this same area long before 1934.

Respondent has expended over $1,350,000 in developing its 1943 lease, and has paid royalties on over 1,300,000 tons of coal to petitioner. (Amended Complaint, First (e), R. 50).

In late 1943, the Big Horn Coal Company, a subsidiary of the gigantic road building contractor Peter Kiewit & Sons[2] of Denver, Colorado, somehow prevailed upon the

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[2] Its size may best be judged from the fact that it has had backlogs of contracts running in the neighborhood of 70 to 80 million dollars. (Affidavit of D. H. Pape, R. 46)

The petition (Pet. 13) thus claims that the United States was a necessary party, as a consequence of the erroneous "specific performance" theory. But it has been well settled in a long line of cases from *United States* v. *Lee*[27] to *Land* v. *Dollar*[28], that a citizen having a property right or other legally protected interest may restrain a governmental officer threatening that right by proposed action of an unconstitutional nature or of a nature contrary to or beyond the purported statutory authority. Of course, the United States is not a necessary party to remedial litigation incident thereto. Here, respondent unquestionably has property rights, non-contractual in nature, in its own business and in its leasehold interest, apart from its contract rights; independently, respondent has a special property interest acquired by lawful membership in a regulated, restricted and limited class, *i.e.*, as one of the need-limited number of Federal coal lessees permitted by the Regulation. *Frost* v. *Corporation Commission, supra; Cf. Philadelphia Co.* v. *Stimson.*[29] The very statute upon which petitioner relies for power to issue the Big Horn lease places that issuance beyond his powers. Regulation 193.3 has been issued and promulgated as law under a specific power and duty in the Leasing Act; moreover, Congress has subsequently amended the Leasing Act, thereby reenacting the Regulation as a part thereof. An officer, like petitioner here, threatening action lawless because beyond and directly contrary to his statutory powers and duties, cannot cloak his dereliction by claiming the United States is a necessary party thereto. Petitioner's same error was unsuccessfully advanced by Albert B. Fall to prevent challenge of his acts beyond and contrary to the statute conferring his authority in the premises. *Santa Fe Pac. Ry.* v. *Fall*, 259 U. S. 197 (refusal to patent properly selected lieu lands).

[27] 106 U. S. 196.
[28] 330 U. S. 731.
[29] 223 U. S. 620.

State of Wyoming, with whom Kiewit had many road building contracts, to allow them to establish a new mine in this immediate area by leasing State lands. (R. 15). Some few months later, in early 1944, the Big Horn Coal Company started producing this substandard type of Sheridan area coal in direct competition with appellant. The disastrous effect of this competition, in a declining market for this coal, is apparent from the Graph, Exhibit F.[3] It has reduced Sheridan's production to less than half its 1,200,000 ton annual capacity.

When the Big Horn Coal Company established its new mine on State lands it had *already* applied for a Federal lease. Big Horn swore this Federal lease was economically necessary to justify the investment required for the establishment of its new state mine. (Original and Amended Complaint, Fifth (c), R. 11). The Big Horn Company was, of course, on notice of the long published and established rule of Regulation 193.3 in force since 1934, in reliance upon which respondent has been induced to do business with petitioner.

Their application, in the teeth of the valued Regulation, aroused an industry-wide storm of protest. Respondent protested before the Department even before[4] its publication by the petitioner; other protestants were the Southern Wyoming Coal Operators Association, the United Mine Workers, the Montana Coal Operators' Association, Coal Producers' Association of Washington, Utah Coal Operators' Association, Colorado and New Mexico Coal Operators' Association, etc. (R. 20).

The effect of Big Horn's slow departmental tactics[4] while hastily proceeding with opening and pushing their State

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[3] The figures represented graphically here were taken from official sources of the U. S. Department of the Interior. Graph F. appears at R. 37, and is incorporated in both the Original and Amended Complaints.

[4] Big Horn had delayed publications of this application from 1943 to 1945 by requesting a special 8¢ royalty rate (2¢ below the usual Federal rate).

mine, was to create the spurious appearance of "going concern values", hardship and equities when the Federal lease was finally considered. Thus the small state lease was to be used as a springboard to the vast Federal reserves. They would "lift themselves by their bootstraps". And they succeeded before the Department.

None of the three administrative decisions in the instant case make a finding of need for an additional mine,[5] nor do they make a finding of an old[6] mine which the Undersecretary thought[7] might alter the need requirement. (Complaint Par. 10, R. 12, 13).

The italicized portions[8] of the first administrative decision (dated April 10, 1947) are an excellent example of the arbitrary and capricious tenor of the departmental decisions herein (R. pp. 17-32).

Typical is the statement: "This office will not countenance any deliberate attempts to circumvent the . . . regulation", when it then proceeds to do that very thing. The argument runs that respondent had the burden of proving "bad faith" in this respect on the part of Big Horn. None of the prior decisions construing the Regulation suggest so illogical and unfair a rule.[9] Big Horn applied for a Federal lease before starting their state mine. They obviously wanted the prohibitory regulation either ignored or overruled. They knew they could not meet the regulation's sole criterion—consumer need—in view of respondent's uniformly below-capacity operations. First they swore their state reserves were inadequate to justify their

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[5] Complaint, Tenth (e), R. 13.

[6] The first decision made gestures in that direction of a vague and implicatory character; later decisions definitely found "new mine".

[7] Actually, all applications are screened against the need criterion (Amended Complaint, Paragraph First (e) and (g), R. 49).

[8] See pages 18 and 19, Record.

[9] See the *Olson* and *Cox* decisions, Amended Complaint, R. 51-61, incl., which are representative of the established construction (Amended Complaint, Paragraph First (e), R. 49).

planned investment before making it; then they rushed ahead with development which they rely upon as creating "going concern" equities. Thus, they adopted a course of action effective only to circumvent the Regulation, whatever their mental state.

The next paragraph of the department's opinion urges that "Reg. 193.3 does not apply to cases where *Federal* lessees seek additional land", citing 43 C. F. R. 193.15. First, that regulation rests upon express authorization by Congress in 30 U. S. C. 203 for granting additional land to *Federal* lessees upon exhaustion of reserves. Second, Regulation 193.15 itself states that its modifications of Federal leases are "to be made under similar procedure and *on the same conditions* as original leases." (italics supplied). Thus the statement quoted is disproved by its own citation. In any event, any rights conferred by § 203 cannot go beyond Congressional intent, which was limited to Federal lessees.[10]

At this point, petitioner's effort begins to disregard the universal criterion of Regulation 193.3—need—by suggesting a novel exception for "going mine", or "existing mine". In practice, in every case since 1934 the challenge has been to prove consumer need for the lease.[11] Only this can serve the basic purpose of the Regulation—preventing recurrence of anarchic over-production.[12] In this case, for the first time, the suggestion is made that the larger and more devastating the new competition on a non-Federal foothold—"existing large mine"—the better the reason for abandoning protection of established Federal lessees. In other words, the larger the violation of Regulation 193.3, the better the justification.

This decision then admits two excellent reasons for deny-

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[10] Naturally, Federal lessees have something analogous to "grandfather" rights; they have made an investment *after* meeting the criterion. 30 U. S. C. § 203 is reprinted at R. 67.

[11] Amended Complaint, Paragraph First (e) R. 49.

[12] See *Cox* and *Olson* cases, *supra*.

ing Big Horn a lease because they show there is no need—(a) there is lots of other competition; (b) the coal is poor."[13]

Next, a full admission is made that issuance of the proposed leases does not meet the criterion of Regulation 193.3 in the following language:

> "The usual criteria to determine the need for a new mine under Regulation 193.3 do not apply." (R. 19).

because Big Horn was a "going concern". (No such exception can be found in the Regulation, its history, policy or application.) Another pretext for refusal to apply 193.3 follows:

> (the) "evidence fails to disclose that its operation (Big Horn's) has jeopardized the continuance of the competing Sheridan-Wyoming mine"[14]

Again, this quotation admits no need, by pointed failure to make the finding of consumer need for a Federal lease for the Big Horn Coal Company, while discussing the economics of the Monarch coal area.

The second decision (dated July 29, 1947) (R. 21) while affirming the first decision clarified the supposed "old mine" issue in the following language (top of page 24, Record):

> *"In essence, a new mine was created"*. (Italics supplied.)

This decision concluded:

> "to grant a lease to Big Horn leaves open the *possibility* of continued existence of both the applicant and its present competitors". (Italics supplied; R. 27).

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[13] "(2) and (3)" R. 18.

[14] The uncontroverted evidence does show Big Horn has reached a production equal to Sheridan-Wyoming's 1943 sales and taken a lion's share of the present market for this substandard coal, leaving Sheridan operating at less than half proven capacity. (Graph, Exhibit F, R. 37.)

Thus, although there was an admission Big Horn was a new mine, the requisite finding of need was again skirted and omitted, and a finding of *possibility* of continued existence was substituted. This palpable error of law appears as a part of a continued search for plausible pretexts to reach a predetermined result.

The third decision (dated October 22, 1947) expressly refuses even to estimate future consumer need (the heart of the "showing of need" criterion):

> "The prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence." (R. 28, 29).

Next comes the remarkable fallacy that a company buying new mining equipment of the latest type makes no *investment* unless it *borrows* money. If it uses its own cash, or its profits, says the petitioner, no investment is made. Thus, petitioner says Sheridan made no investment since it last borrowed money (Prior to 1934) (R. 30, 31).

Accent on bigness of Big Horn is the closing keynote of this decision. Without finding consumer need, the very thing which makes Big Horn's violation of the Regulation the more menacing is used as the pretext for exemption.

Finally, the decision refuses to set the limits of the supposed "exception" to the Regulation.

> "What the decision would be *were* a case presented where a new mine opened on non-Federal lands with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding." (R. 31, 32).

But this is exactly the case presented. The Big Horn Coal people filed a Federal lease application even before incor-

poration. This they did because of inadequate state reserves (which had to be and was asserted under oath in the application). Then, the very question to be determined is whether or not existence "for any period of years" (what period?) or "establishing a position of importance" (i.e., mere bigness) can be substituted for the finding of need required by the law of Regulation 193.3.

This transparent attempt to side-step the plain language of the Regulation and its long-standing interpretation is revealing. Even the new "exception" illegally attempted is couched in negative terms of the utmost vagueness, thus making Big Horn its sole beneficiary.

So, upon these shifting sands of fallacies, pretexts and nonsequiturs, Big Horn is alone granted exemption from the law of the land—essentially because it is big. This the Court of Appeals has properly struck down, as the record will demonstrate.

REASONS FOR DENYING CERTIORARI.

1. Petitioner charges error "as to respondent's standing to sue" in that:

> "the Court below *concluded that the regulation was in effect incorporated into the lease.* On that premise, it held that the lease contained *an agreement* that the United States would limit future coal-mining leases of the public lands to cases in which there was a satisfactory showing that an additional coal mine was *needed* and *hence that respondent had standing to maintain this suit.*" (Pet. 9).

He then chiefly and almost exclusively endeavors to show that the terms of the Regulation did not forbid the Secretary himself to issue the lease.

Respondent is compelled to divorce these numerous issues; and will show: (a) That, by its terms, by its hitherto uniform application and in the light of its purpose, the Regulation forbids the issuance of the leases; (b) that the Regulation has the force of statute, and is not a "mere

declaration of policy"; and (c) that violation of the Regulation is illegal, and respondent has standing to challenge this illegality, because the Regulation was incorporated into respondent's lease, and was relied upon by respondent, and because respondent is a member of the circumscribed and limited class created by the Regulation.

Regulation 193.3 prohibits issuance of the lease in question by its terms, purpose, and uniform interpretation. Both the original and amended complaints allege that the appellee has not made, and cannot make, the requisite finding of fact—i.e., that there is consumer need for Big Horn's production. These allegations stand undenied. (See, for fuller treatment, Counterstatement, *supra*, pp. 5-9).

The terms of Regulation 193.3 clearly and unmistakably prohibit issuing a lease to Big Horn without this requisite finding:

> "SHOWING REQUIRED THAT AN ADDITIONAL COAL MINE IS NEEDED. The General Land Office *will* make favorable recommendation that leasing units be segregated and that auctions be authorized *only* in cases where there has been furnished *a satisfactory showing that an additional coal mine is needed* and that there is an *actual need for coal which cannot otherwise be reasonably met.*" (Italics supplied.) (43 C. F. R. 193.3).

The purpose of Regulation 193.3, promulgated in February 1934 was preventing the creation of unneeded Federal coal mines. Anarchic conditions in the coal industry are recurrent results of chronic peacetime overcapacity, and were then most severe. The creation of new unneeded Federal mines would obviously have a disastrous effect upon the investment, conservation practices, and revenues of existing Federal coal lessees. The terms of the withdrawal letters (Exhibits A and B, R. 16 and 17) which immediately preceded the promulgation of the Regulation further clarify this point and elucidate the high policy of law behind the regulation. A chief purpose of both actions was self-

evidently to prevent by law the creation of *unneeded* competition for existing Federal coal lessees.

In the three recent cases within the Department (which restate the position of the Department in some forty other cases), the Regulation has been repeatedly construed in accordance with the decision of the Court of Appeals. In *Carl T. Olson*, Bismarck N 024806, Decided March 25, 1946, and the same case on rehearing, December 19, 1946, together with *Lyman Ray Cox*, Salt Lake City, 065269 N, the Regulation was properly treated as follows:

(1) The petitioner invoked the "*rule*" of 193.3 as a *rule* having the force and effect of law which *precluded* granting a lease to an unneeded mine.

(2) The petitioner treated the policy which it established as one of broad public significance affecting third parties *and especially protecting the existing coal lessees.*

(3) Petitioner specially indicated that the Regulation would have to be repealed before its policy was abandoned;

(4) The Regulation was *invoked specially as a part of the Federal Code of Regulations*, as required by 5 U. S. C. A. Sec. 1002 and 44 U. S. C. A. Sec. 511.

Specific reference to the above conclusions from the *Olson* and *Cox* cases are as follows:

(1) The *Carl T. Olson* case, No. A 24226, dated December 19, 1946, states:

> "The ground for the *decision* was a *finding* that there is already sufficient productive capacity in the vicinity to meet the demands of the market. . . . In such cases the *rule* of the Department *precludes* the granting of an additional coal lease (43 Code Federal Regulations 193.3). Further, upon examination of the reasons which gave rise to the establishment of the rule the decision concluded that it would be contrary to the

public interest to *abandon this rule.*" (Italics but not parentheses supplied, R. 57).

(2) A previous decision in the same case (A 24226) dated March 25, 1946, contains the following significant language:

"This consideration taken into conjunction with the position of the Department as a present and potential royalty owner, indicates that *revision* of the Departmental *rule* at this time *would be harmful to the lignite coal industry and not in the public interest.*" (Italics supplied, R. 56)

(3) The *Lyman Ray Cox* case, *supra*, after quoting 43 Code Federal Regulation 193.3 stated:

"This *regulation* was *promulgated* in 1934. The propriety of continuing the regulation was recently examined in detail and it was concluded that the *repeal* of the regulation would be harmful *both to the bituminous coal industry* and to the public interest." (Italics supplied, R. 60).

Thus, these decisions clearly indicate petitioner is powerless to issue the leases in the absence of need; they unmistakably mean he is precluded from and powerless to do so *in view* of the Regulation and, at the very least, that he is powerless to issue the leases *without repeal*[15] of the Regulation.

Naturally, this accords with the rule that *the Regulation has the force of statute.* The Secretary of the Interior has authority under the leasing act to issue Regulations necessary and proper for carrying out his functions. 30 U. S. C. § 189.

Pursuant to this authority he issued Regulation 193.3 and caused it to be published both in the Federal Register and in the Federal Code of Regulations.

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[15] It should be carefully noted that, in the various departmental decisions in the case at bar (R. 17 through 32) the regulation has *not* been *abandoned* but has again been *reaffirmed*, no doubt for the reasons so eloquently stated in the *Olson* cases.

It was his duty to publish in the Federal Code of Regulations those of his regulations which had the force and effect of statute. His responsible agent has stated in the preface to the land regulations that they are published in pursuance of the requirements of the statute:

"FOREWORD

"This pamphlet contains the *codification* of the rules and regulations assigned to Par. 193, Title 43, of the Code of Federal Regulations. No amendments thereto have been made. The regulations were codified and published *pursuant to* Section 11 of the Federal Register Act, as amended (50 Stat. 304; 44 U.S.C. Sup. 311). Part 193 contains the regulations relating to coal permits, leases, and licenses, exclusive of Alaska." * * *

"The Federal Register Act makes the documents which were codified and published pursuant thereto prima facie evidence of the text of such documents and of the fact that they are *in full force and effect* on and after the date of publication."

* * * * *

"FRED W. JOHNSON,
Commissioner."

(Italics supplied)

The pertinent provisions of 44 U. S. C. Supp. § 311, referred to in the Foreword, follows:

"Report by Government agencies of documents issued: publication in supplement to Register.

(a) On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete *codification* of all documents *which, in the opinion of the agency, have general applicability and legal effect* and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938 or on the same date of every fifth year thereafter. The Com-

mittee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register."

• • •

"(c) The codified documents of the several agencies published in the supplemental edition of the Federal Register pursuant to the provisions of subsection (a) hereof, as amended by documents subsequently filed with the Division, and published in the daily issues of the Federal Register, *shall be prima-facie evidence of the text of such documents and of the fact that they are in full force and effect on and after the date of publication thereof.*" . . . (44 U. S. C. Sup. 311) also 5 U. S. C. 1002 and 44 U. S. C. Sup. 305) (Italics supplied).

Thus, petitioner has led every one to believe that Regulation 193.3 has the force and effect of statute by publishing it in the Federal Code with a preface referring to these statutes. The petitioner in the District Court for the first time asserted that the Regulation is a mere internal declaration of policy without the force and effect of law.

Obviously, the contention cannot be sustained that the Regulation, thus duly promulgated, was a mere internal directive for the guidance of Bureau of Land Management and did not bind the Secretary of the Interior. The rule is well settled that the land Regulations of the Secretary of Interior have the force and effect of statute. *Hodgson* v. *Midwest Oil Company*, 297 F. 203. See also *Germania Iron Company* v. *James*, 89 Fed. 811. Petitioner has at no time openly contested this rule.

In the *Hodgson* case, the issuance of a lease to the Midwest Oil Company would have been illegal, and the leasing act unconstitutional, but for a regulation of the Secretary of the Interior. This Regulation provided the constitutionally necessary notice to other possible claimants which had been omitted from the Statute.

If these Regulations can shore up the Leasing Act against otherwise sound constitutional attack, surely they must have the effect of statute. They cannot be mere pious

platitudes of internal policy or mere directives to personnel, subject to the personal whim and caprice of the occupant of the Secretary's chair.

Germania Iron Co. v. *James, supra*, is a complete answer to the contrary contention, as the Court of Appeals emphasized. In *Germania*, an established practice of the General Land Office, even though not formalized into statutory regulation, bound the Secretary as well as his subordinates. Moreover, petitioner's own decision here (being mere affirmance of a decision of the Bureau of Land Management) furnishes no hint that the Secretary had any idea of exercising independent authority to override the regulation, not possessed by that agency of his.

It should be noted that petitioner has neither mentioned the *Germania* case, which was given maximum emphasis as on all fours by the Court of Appeals; nor the more recent cases[16] expounding the same necessary rule, namely, that when an officer has issued a statutory regulation under a Congressional delegation of legislative power, he has fully exercised his "discretion"; thereafter he has no power to ignore and rise above the law of the land, merely because it happens that he was the conduit of its making.

Petitioner has abandoned his citation below of leading Interior Department language construction cases. Very likely this is because they are in point, but against him. Compare *Work* v. *Rives*, 267 U. S. 175, cited by petitioner below, with *Work* v. *Mosier*, 261 U. S. 352, and *Work* v. *McAlester*, 262 U. S. 200. The petition instead seeks to negate the conclusion of the Court of Appeals that the Regulation was incorporated into Sheridan's lease by operation of law (*Wood* v. *Lovett*, 313 U. S. 362), by reliance upon the inapplicable rule of *Charles River Bridge* v. *Warren Bridge*[17]

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[16] *Consumers Power Company et al.*, 6 S. E. C. 444 (1939); *United States* v. *Perkins*, 79 F. (2d) 533 (C. C. A. 2d, 1935); *Sibray* v. *United States*, 282 Fed. 795 (C. C. A. 3d, 1922); *United States* v. *Dunton*, 288 Fed. 959 (S. D. N. Y. 1923).

[17] 11 Pet. 420.

and related cases.[18] Respondent freely concedes the rule of these cases that *doubtful* language in grants of *special privileges* is to be construed most strongly against the *donee* and in favor of the public. The difficulty is that the rule has no application to the factual situation in this case. First, no doubtful language is present in Reg. 193.3 (see *supra*), and moreover the language of the Regulation has an established and unmistakable administrative construction. Next, this is not, as were the cases cited by petitioner, a grant of special privilege, i.e., a *particular grant* of a monopoly of an essential and normally governmental service, such as a bridge, a city water works, or a toll road. The present case is, on the contrary, one of attempted illegal breach of a *general regulation* restricting an entire industry—Federal coal lessees—in the interest of the public ("consumer need"), as well as in the interest of the industry protected. Closely resembling it are *Frost* v. *Corporation Commission*, 278 U. S. 515; *Chicago Junction* case (*Baltimore & Ohio RR.* v. *United States*), 264 U. S. 258; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. (2d) 308, 322 (App. D. C. 1938). In this type of situation, the rule of strict construction, designed as it is to protect the public, applies against the wrong-doing governmental officer. Finally, this case is even stronger on its facts than *Frost* and *Chicago Junction* because it is squarely upon all fours with *Wood* v. *Lovett*, *supra*. In *Wood* v. *Lovett*, a citizen had bought government property at auction and received a deed, quit claim in form; but there was a statute guaranteeing such purchasers against certain defects in title. This Court held that the statute was included in the deed by operation of law. So here the Regulation guaranteeing that respondent's lease was one of a restricted number of leases is included by operation of law because respondent has paid full price for the lease and has relied upon the regulation in doing so (Amended Complaint First (e), R. 49). Moreover the lease itself (Exhibit J., R. 60, 61) states that it is

[18] Pet. 10.

issued "under, pursuant, and subject to" the Mineral Leasing Act; that Act having been amended since the promulgation of the Regulation, the Regulation has been reenacted as a part thereof. *R. J. Reynolds Tobacco Company* v. *Helvering*, 306 U. S. 110 (1939).

2. Petitioner urges that "as construed by the Court below, the Regulation is invalid because it exceeds the statutory authority granted by the Mineral Leasing Act". He seems to overlook that he charges himself with a long and studied course of illegal action, since the Court below has merely adopted the construction he has employed for the thirteen years preceding the present case. (*Supra*, pp. 11-14)

After this confession of fault, he asserts, to prove it, a sweeping "discretion" which he cannot "abdicate", extending to the breach of the statutory Regulation. For this, he cites 30 U. S. C. § 201. But this section authorizes the Secretary of the Interior to divide coal lands for leasing; and "in his discretion, upon the request of any qualified applicant or on his own motion, offer . . . for leasing . . . and shall award leases thereon by competitive bidding or by such other methods as he may *by general regulations* adopt . . ." (italics supplied). Thus, the Section quoted itself provides for the governance of leasing by *general* regulation adopted by the Secretary. This certainly cannot mean that he is to make *general* regulations only that he may breach them at will.[19] When this citation is coupled with 30 U. S. C. §189, specifically authorizing the Secretary "to prescribe necessary rules and regulations . . . to carry out and accomplish the purposes of this act", and buttressed by the cases which the Secretary[20] and his predecessor[21] have repeatedly cited for the authority to make the restrictive conservation rule represented by Reg. 193.3 (*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344; *United*

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[19] *Germania Iron Co.* v. *James*, *supra*.

[20] *Olson* case, at R. 52, 53.

[21] Withdrawal letters, Exhibits A & B, Original and Amended Complaints, R. 16 and 17.

States ex rel. McLennan v. *Wilbur*, 283 U. S. 414) his authority to do so is perfectly undeniable.

The cases now cited by petitioner to avoid the correct result, abstracted as they are from the remote backdrop of Indian affairs[22], are totally irrelevant. There the Indians were claiming that a property right had been created for them by a temporary withdrawal; and could not be divested by the Secretary's customary, proper and formal restoration of the land to the public domain. Here the respondent has not asserted that any property interest was created by the withdrawal, and the petitioner has not attempted a restoration. Here respondent asserts only the illegality of leasing withdrawn and non-restored lands. Independent of the withdrawal, respondent's property rights, first deriving from its own lease, and its terms, and second from the special interest arising from respondent's property status as a regulated member of a special class—Federal coal lessees—provide standing to sue.

Thus, petitioner here has made a lease upon commercial terms to respondent. As so well demonstrated by the Court of Appeals[23], the statutory Regulation in question limiting additional competing leases to those needed by the consuming public, not only affects the value of the lease, but is a most valuable incorporated part thereof. Petitioner makes no attempt to reply to *Frost* v. *Corporation Commission, supra*, emphasized by the Court below, a case where this Court has extended its protection to a very similar though inferior property right, a regulatory franchise against unneeded competition which was not even part of a lease; nor to the *Chicago Junction* case[24], nor to the radio cases[25],

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[22] *Wilbur* v. *United States*, 281 U. S. 206; *Sioux Tribe* v. *United States*, 316 U. S. 317; *Ute Indians* v. *United States*, 330 U. S. 169.

[23] R. 85.

[24] *Chicago Junction* Case *(Baltimore & Ohio R. R.* v. *United States)*, 264 U. S. 258.

[25] *Fed. Comm. Comm'n* v. *Nat'l Broadcasting Co.*, 319 U. S. 239; *Scripps Howard Radio* v. *United States*, 316 U. S. 4; *Fed. Comm. Comm'n* v. *Sanders Radio Station*, 309 U. S. 47.

which are likewise in point here, and relied upon by the Court of Appeals.

Petitioner concludes this point with an inferential charge, thoroughly discredited in one of his own opinions[26], that respondent enjoys a monopoly—presumably of the coal industry. (Pet. 12)

He would thus ignore that the Mineral Leasing Act's prime purpose is conservation; that the acreage limitation of the Act is a self-executing guaranty against monopoly; and that the "consumer need" criterion for additional leasing is a further guaranty.

3. The petition next asserts that the lower Court has restrained the threatened breach of respondent's lease contract and this is, therefore, the equivalent of a suit for specific performance of a contract of the United States. (Pet. p. 12). Not so; what is really restrained is an assault on independent property rights created by the lease; moreover, respondent's prayer for relief is purely negative and prohibitory, in substance as well as in form. (R. 15). It requires no real, positive action, either from the petitioner or from the United States. Cases which petitioner cites (Pet. 12) are not in point here; they relate solely to injunctions, negative in terms, but in reality requiring positive action—i.e., specific performance. That question is not involved. But it is interesting to note that the plaintiff in *Goldberg* requested forced acceptance of an *offer*, not specific performance of a contract which created independent property rights; that any damage—arising from refusal to accept performance of contract services—in *Wells*, was completely compensable in the Court of Claims; that *Mine Safety*, in form a challenge to the government's authority to set off renegotiation deductions from amounts otherwise due the citizen, in reality sought to compel the government to pay out money.

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[26] R. 19. "Both companies apparently served customers over a very large area embracing several states in which there are numerous other active mines."

4. The petition (Pet. 13-15) charges error to the Court of Appeals in continuing the District Court's temporary injunction upon remand "until final disposition of the action". This phrase, lifted out of context, petitioner would torture into a broad and sweeping injunction for the entire duration of the litigation. Thus he finds violation of statutory requirements of findings of fact, foreclosure of all possible relief arising from changing conditions, and denial to petitioner of any opportunity to be heard on the validity of defenses, balancing of conveniences, etc.

An examination of the terms of the District Court's injunction (Addendum to Record, p. 91*ff*) and restoration of the quotation to context (R. 86) reveal petitioner's claims to be particularly erroneous and unfair.

The only action appealed was the District Court's order denying respondent's motion for leave to amend its complaint. The only questions then before the District Court were that motion, and a companion motion for preliminary injunction. The District Court, on June 4, 1948, entered a temporary restraining order or injunction to protect its jurisdiction until it disposed of them. By its order of July 6, 1948 (R. 63) it overruled both motions, but continued the temporary injunction for ten days in order to protect an orderly review of its action. Only the order denying the motion to amend the complaint was appealed, so that this was the only action of the District Court thereafter protected by the temporary injunction.

The scope of the District Court's injunction of June 4, 1948 by its own terms was naturally limited to protecting its action on the motions before it, just as its continuation thereof on July 6th was limited to protecting review of its action.

The temporary injunction of June 4th provided:

> "This order restraining and enjoining the issuance of the aforementioned coal mining leases shall remain in effect until the further order of this Court upon the disposition of the aforementioned motion for leave to file amended complaint and if the motion for leave is

granted then until plaintiff's motion for preliminary injunction is disposed of by the Court, and in the event the motion for leave is granted *then the motion for preliminary injunction shall be further heard within ten days thereafter.*" (Italics supplied)

The scope of a continuation can be no greater than the scope of the injunction continued. Not only is it absurd to argue that the Court of Appeals would attempt to enlarge the scope of the District Court's injunction but the full context negatives any such attempt.

The Court of Appeals' opinion provided:

"The judgment of the District Court is, therefore, reversed and the case remanded with instructions to that court *to permit the filing of the proffered amended complaint* and to deny defendant's motion to dismiss *in so far as that motion rests upon the ground that plaintiff has no standing to sue.* The temporary injunction heretofore issued by the District Court on June 4, 1948 will be continued in effect until final disposition of the action by that court." (Italics supplied)

The Court of Appeals had jurisdiction to continue the District Court's injunction until the subject matter which that injunction protected (the District Court's action on amendment of the complaint) had been finally disposed of by the District Court in accordance with the remand. Thus "final disposition of the action" *under review* could only mean the allowance of the amendment of the complaint and denial of dismissal on the ground twice held unsound. Then, the Court of Appeals continuance of the injunction, by its own terms, would automatically expire, and the terms of the District Court's order would automatically give an additional ten days for further hearing on the question of a preliminary injunction.

Even if the petitioner really misunderstands the Court of Appeals' plain language, and believes he needs clarification or alteration of the terms of the remand, his simple remedy would be to so move in the Court of Appeals. He seems to

recognize this (Pet. 15) but urges that this would require a "modification before the expiration of the present term of that Court." Why has he for four months, within the very time which he claims is a bar, failed to ask the Court of Appeals for clarification of its own mandate; and, at the same time, petitioned this Court for reversal of the Court of Appeals by arging a supposed error he has not even in the slightest manner brought to that Court's attention?

5. In the light of this real factual picture and legal background, the inaccuracies and overstatements of Point 5 of the Petition (Pet. 16) become apparent.

Contrary to the eloquent but unsupported forebodings of petitioner, the situation here is, as a matter of fact, unlikely to recur. The Secretary has never previously tried to issue a lease without the finding of consumer need; and he assures everyone of his devotion to that sound principle of the Regulation even in his very decision of this matter. In other leasing, where he made this finding, it would be, as a practical matter, both futile and impractical to seek restraint.

The statutory finding of fact, if so made, would be presumed correct and entitled to great respect; and this fact—consumer "need which cannot otherwise reasonably be supplied"—would preclude the existing lessees from showing irreparable injury, since they could not supply the coal anyway.

Petitioner, when he asserts "delays incident to such litigation" as an obstacle to all leasing, appears either to betray intention to issue leases without requisite statutory findings at his whim, or to suggest the bare possibility of frivolous future litigation as a reason for overturning just and lawful protection of respondent from destruction by petitioner's unusual, discriminatory and unlawful action in the case at bar. On the contrary, enforceability of this sound conservation regulation will restore the attraction of his leases, by lessening the recurrent threat of anarchic over-production of coal in the West. This problem, we

might suggest, is the precise reason why the Regulation was adopted in the first place and why it has been continued and reaffirmed for fifteen years.

The hinted ill effects on other Departments seem to amount to no more than that they will have, as usual, to observe uniformly construed and unrepealed Regulations, published by them in the Federal Register as having the force of law; scarcely a novel or shocking idea—but, on the contrary, a principle of justice so settled and accepted as to make needless yet another reiteration by this Court.

The Court of Appeals has not interfered with the discretion of the District Court, by the form of its mandate, as petitioner now charges. (*Supra*, 22, 23). Direction to the District Court extends only to the substantive law as decided by the Court of Appeals, with continuance of restraint only until the District Court can consider the matter of preliminary injunction in the light of that law. Nor has petitioner, by an appropriate motion, rendered the Court of Appeals any opportunity to correct the supposed error in the form of its mandate. This seems a necessary prerequisite, in fairness, to review here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be denied.

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July, 1949

The Court of Appeals over opposition of petitioner then extended the June 4 injunction pending appeal or its further order (R. 72). Petitioner does not now raise any question as to that order. However, upon final hearing the Court of Appeals concluded that the injunction of the district court of June 4 "will be continued in effect until final disposition of the action by that court" (R. 86). This direction deprives petitioner of an opportunity to be heard on all of those matters essentially relating to the injunctive process such as the validity of his defenses, the balance of convenience, the nature, extent and remediability of the possible damage to plaintiff, and similar matters.

In addition, the action of the Court of Appeals in ordering the extension of the injunction has the effect of ordering the district court [5] to enter an interlocutory injunction unsupported by findings of fact and conclusions of law, in defiance of Rule 52(a) of the Federal Rules of Civil Procedure. Thus, this Court is left to speculate as to what facts, if any, exist to support the interlocutory injunction.[6] If the district court had done what it is now ordered to do, its action would have been

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[5] It is not clear whether the Court of Appeals has adopted the injunction of the district court and extended it as its own process or whether it has ordered the district court to extend the injunction. It is assumed that the statement in the opinion is to be regarded as a direction to the district court, rather than a retention of jurisdiction by the Court of Appeals over the preliminary injunction, while the rest of the case finds its way through the district court.

[6] The Court of Appeals made no findings of its own.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 755

JULIUS A. KRUG, DEPARTMENT OF INTERIOR,
PETITIONER

v.

SHERIDAN-WYOMING COAL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Julius A. Krug, prays that a writ of certiorari issue to review the judgment entered on January 31, 1949, by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 77-86) is reported at 172 F. 2d 282. Its opinion on a prior appeal (R. 1-4) is reported at 168 F. 2d 557.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1949 (R. 87). The juris-

5. Not only is resolution of the questions previously discussed important in administration of federal statutes generally but the case is of special importance to the proper administration of the Mineral Leasing Act. The decision below means that all persons who have received coal leases since 1934 have standing to attack in court the issuance of new leases which might possibly result in competition with existing mines and to prevent the issuance of leases pending conclusion of the litigation. While the extent of injury cannot be estimated, the delays incident to such litigation would obviously seriously interfere with the leasing of Government lands. Moreover, the manner in which the court below dealt with this case raises questions of importance in the administration of justice, particularly the extent to which an appellate court should interfere in matters of discretion confided to the district courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1949.

diction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a regulation of the Secretary of the Interior which merely instructed his subordinates as to the criteria which should govern them in making recommendations as to coal leases upon the public domain created property rights in a lessee of public coal lands which gave it sufficient standing to enjoin the leasing of other public lands to a third party.

2. If so, whether one Secretary of the Interior has authority to bind or reduce by contract the discretionary duty and authority vested by statute in him and his successors with respect to the execution of mineral leases.

3. Whether an officer of the United States may be enjoined from leasing government lands on the ground that such act would constitute a breach of a contract with the United States not to lease such lands.

4. Whether the Court of Appeals, in reversing an order denying leave to file an amended complaint, so abused its discretion in directing continuance of a temporary injunction until final disposition of the action by the trial court as to warrant invocation of this Court's supervisory powers.

APPENDIX

Relevant portions of the Mineral Lands Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. secs. 181 *et seq.*, in effect at the time of the departmental decisions, are as follows:

SEC. 1 [30 U. S. C. 181]. * * * deposits of coal * * * and lands containing such deposits owned by the United States * * *, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act * * *.

SEC. 2 [30 U. S. C. 201]. * * * the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: * * * where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits

STATUTES AND REGULATION INVOLVED

43 C. F. R. sec. 193.3 provides:

> *Showing required that an additional coal mine is needed.* The General Land Office [1] will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met.

Provisions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, are printed in the Appendix, pp. 17-23, *infra*.

STATEMENT

The judgment sought to be reviewed (1) reverses the trial court for refusing to allow respondent to file an amended complaint seeking to enjoin petitioner from granting to the Big Horn Coal Company a lease to mine coal from public lands under the Mineral Leasing Act of 1920, 41 Stat. 437, 30 U. S. C. sec. 181, *et seq.*, (2) directs the trial court to allow the filing of that complaint, and (3) directs continuance of a temporary injunction until final disposition of the case by the trial court.

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[1] Effective July 16, 1946, the General Land Office was abolished and its functions transferred to the Bureau of Land Management by Reorganization Plan No. 3 of 1946 (11 F.R. 7875, 7876; 7776).

The complaint in question (R. 10-15, 49-51) may be summarized as follows:

Respondent, a lessee of public lands under the Mineral Leasing Act of 1920, is engaged in the mining and distribution of sub-bituminous coal. The Big Horn Coal Company carries on a similar business in competition with respondent, its coal being obtained from mines under lease from the State of Wyoming. On December 18, 1943, it applied for a coal lease of federal lands adjoining the State lands already under lease and later in 1945 applied for additional lands. At the public auction on January 16, 1946, the Big Horn Company was the only bidder. However, a lease was not awarded at that time because of protests by respondent and others on the ground that a regulation promulgated by the Secretary and published as 43 C. F. R., sec. 193.3, prohibited the leasing of the lands involved except on finding that an additional coal mine was needed.

After a hearing the Under Secretary of the Interior approved a decision of the Bureau of Land Management dismissing the protests. This decision stated that the regulation invoked did not apply where, as in the case of the Big Horn Company, additional lands were sought for an existing mine whose deposits were becoming exhausted. A motion for rehearing was denied by the Under Secretary, and the Secretary denied a motion for exercise of supervisory power.

This case has been through the lower courts twice. It was originally filed on November 4, 1947 (R. 10-15), at which time a temporary restraining order was issued *ex parte*. On November 17, 1947, the complaint was dismissed on the grounds that the plaintiff had no standing to sue, that the Secretary's power to grant coal leases is discretionary and not subject to judicial review and that the Regulation is a declaration of policy which does not diminish or restrict the Secretary's discretionary powers (R. 39-43). The temporary restraining order was continued until November 21, 1947, and the Court of Appeals on December 4, 1947, granted an application for a temporary injunction pending disposition of an appeal from the dismissal (R. 6).

On March 29, 1948, the judgment of dismissal was affirmed on the ground that respondent, as a member of the coal industry in general, had no standing to sue (R. 1-4), 168 F. 2d 557. However, although the parties had argued the merits of the matter, the appellate court declined to decide whether a lessee of federal coal lands could maintain the suit because of its view that the original complaint did not allege that respondent was in this category. But thereafter it amended its judgment so as to permit the trial court to entertain a motion for leave to amend the complaint (R. 6).

Upon remand a temporary injunction was entered on June 4, 1948, and on July 6, 1948, plain-

at any one time when market conditions are such that the lease can not be operated except at a loss.

SEC. 27 [30 U. S. C. 184]. No person, association, or corporation, except as herein provided, shall take or hold coal * * * leases or permits during the life of such leases in any one State, exceeding in the aggregate acreage two thousand five hundred and sixty acres * * *. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. * * * Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatso-

tiff's motion for leave to file an amended complaint was denied and the temporary injunction continued for ten days (R. 63). On July 16, 1948, the court below continued the temporary injunction in effect pending final disposition of the court (R. 72). On January 31, 1949, the Court of Appeals entered the judgment which petitioner seeks to have reviewed.[2]

At the end of its opinion, the Court of Appeals summarized its reasoning (R. 84-86). In paraphrase, it was as follows: The regulation (43 C. F. R. sec. 193.3) was valid because the Secretary was empowered to withdraw the lands from leasing and therefore could impose conditions upon which he would issue leases. Since the regulation was published in the Code of Federal Regulations, it had the force of a statute until modified or repealed. Rightly construed and as it had been construed until the Big Horn application, it meant that leases would not be

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[2] Respondent had both taken an appeal as of right and applied for allowance of a special appeal under Section 17-101, District of Columbia Code. On September 17, 1948, the special appeal was denied as was a motion to dismiss the appeal as of right (R. 74-75). It is believed that this latter order was erroneous because an order denying a motion for leave to file an amended complaint is discretionary and not final and appealable (*Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Dieterich* v. *Dieterich*, 48 App. D. C. 356, 357; *Kulesza* v. *Blair*, 41 F. 2d 439 (C.A. 7), certiorari denied, 282 U.S. 883), and the fact that the order was entered after final judgment rather than before would not seem to change its nature (*United States* v. *Muschany*, 156 F. 2d 196 (C.A. 8)). However, we do not urge that the judgment should be reversed on this ground since the court below had power to entertain an appeal under Section 17-101 of the District of Columbia Code of all interlocutory orders and a reversal on that ground would simply prolong this litigation if, as would be probable, the amended complaint were filed as a new suit.

issued in the absence of a showing that an additional coal mine was needed. Since petitioner's lease in its introductory clause recited that it was made subject to the Leasing Act and since 43 C. F. R. sec. 193.3 was valid under that Act, the regulation was one of the conditions of the lease and that contract conferred and was intended to confer on respondent the right to be one of a limited number of lessees and, as possessor of that valuable right, respondent could sue for its protection. The Secretary's wide discretion under the Leasing Act does not allow him "to violate or ignore an existing departmental regulation which established one of the conditions upon which he entered into a contract of lease." (R. 86.)

Judge Edgerton, who had concurred in the result on the first appeal, this time dissented. His succinct opinion forcibly states the petitioner's position. Judge Edgerton said (R. 86):

> Our former judgment was that the District Court might grant or deny a motion to amend the complaint "as in its discretion seems proper." That judgment became final long ago. This court now reverses it and requires the District Court to grant the motion. This reversal seems to me not only inconsistent with orderly procedure but probably beyond our authority.
>
> I agree with the District Court that the proposed amendment of the complaint would add nothing material. On the former appeal we did not undertake to decide that question. I think the Department regulation on which this

court now relies was not intended to be, did not appear to be, and was not a term or condition of appellant's lease. Its apparent purpose and effect were not to increase the rights of lessees, but to limit the expectations of applicants for leases. It did not purport to control the discretion of the Secretary in making leases, but only that of his subordinates in making "favorable recommendations." Moreover the United States is a necessary party when suit is brought to prevent the leasing of its lands.

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that respondent had standing to sue to enjoin the Secretary of the Interior from making a lease of federal coal lands.

2. In instructing the district court to deny petitioner's motion to dismiss insofar as it rests upon the ground that respondent has no standing to sue.

3. In holding that there is jurisdiction to enjoin the Secretary of the Interior from executing a lease of public lands of the United States.

4. In reversing the order of the district court.

5. In ordering continuance of the injunction until final disposition of the case by the district court.

REASONS FOR GRANTING THE WRIT

1. Having noted that the regulation was issued under authority of the Mineral Leasing Act and

that the lease to respondent made reference to that Act, the court below concluded that the regulation was in effect incorporated into the lease. On that premise, it held that the lease contained an agreement that the United States would limit future coal-mining leases of the public lands to cases in which there was a satisfactory showing that an additional coal mine was needed and hence that respondent had standing to maintain this suit. This holding as to respondent's standing to sue is erroneous and raises questions of importance in the administration of the Government's program for leasing of coal mines and other resources.

It ignores the language and purpose of the regulation which, as Judge Edgerton said (R. 86), "did not purport to control the discretion of the Secretary in making leases, but only that of his subordinates in making 'favorable recommendations' ". Since the regulation indicated the standards to be followed by those making leasing recommendations, it was published for the information of possible applicants for leases. At most, it constituted simply a declaration of policy which the Secretary desired his subordinates to apply. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128-129. It gave no assurance either that the policy would continue or that it was binding in all cases upon the Secretary or any of his successors. However respondent might be hurt by a change, it had no right, enforceable judicially, to have the policy continued. *Reichelderfer* v. *Quinn*, 287 U. S. 315, 319;

Tennessee Power Co. v. *T. V. A.*, 306 U. S. 118, 141. Any implication that merely because the regulation existed at the time respondent's lease was executed the Secretary was contracting that the issuance of new leases would be indefinitely circumscribed thereby is negatived by the rule that grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public. "A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute." *Williams* v. *Wingo*, 177 U. S. 601, 603; *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257; *Larson* v. *South Dakota*, 278 U. S. 429, 435; *Water Company* v. *Knoxville*, 200 U. S. 22, 31-33; *Covington* v. *Kentucky*, 173 U. S. 231, 239; *Turnpike Co.* v. *Illinois*, 96 U. S. 63, 68-69; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546-548.

Thus, even if an Act of Congress had been enacted in the terms of the regulation, no legal rights would have been vested in respondent. Since the policy was stated simply in a regulation promulgated by the Secretary under the Mineral Leasing Act, the absence of standing to sue is even clearer. The Secretary's discretion in the administration of these public lands is a continuing one. The regulation does not purport to relinquish this discretion to amend or revoke the regulation or, as here, to determine the factual situations to which it should

apply.[8] There is nothing in the regulation which indicates an intention to abdicate his discretionary duties and to have the matter determined solely on the basis of the regulation, with court supervision of the determinations thereunder.

2. As construed by the court below, the regulation is invalid because it exceeds the statutory authority granted by the Mineral Leasing Act. The Act vests in the Secretary the discretionary power to determine whether or not a lease should issue. 30 U. S. C. sec. 201. This was by its nature a continuing authority and duty which the Secretary was not empowered to abdicate. Cf. *Wilbur* v. *United States*, 281 U. S. 206, 216-217. The court below reasoned that the Secretary "had power to withdraw lands from leasing and so could impose the conditions upon which he would lease" (R. 84). But the power to withdraw lands does not carry with it an authority to create property interests in persons benefited by the withdrawal. *Sioux Tribe* v. *United States*, 316 U. S. 317; *Ute Indians* v. *United States*, 330 U. S. 169. Under the decision below, the Secretary has created in respondent a right to restrict the leasing of any public lands which might be used to compete with respondent. Plainly the Mineral Leasing Act did not authorize

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[8] As demonstrated by the three departmental opinions dealing with this matter, the Secretary's conclusion under the circumstances of this case was perfectly reasonable and not arbitrary and capricious. None of the rulings in the earlier cases referred to by the court below as the fourteen years administrative construction involved a situation where denial of the lease would put a going business out of operation.

the creation of such a negative easement in the public domain. Rather than vesting the Secretary with unlimited discretion as to terms and conditions which should be included in leases, the Act itself specifies what those conditions shall or may be, expresses a strong policy against use of the public lands in restraint of trade and limits the acreage in which a single lessee shall have an interest. 30 U. S. C. 181, 184, 186, 187, 207. Nowhere in the Act is there even a hint that the Secretary is authorized to barter away his discretion to determine whether lands shall be leased or by means of a negative covenant to confer upon a lessee an interest in public lands beyond the tract described in his lease.

3. The avowed basis for the conclusion below is that the court is exercising jurisdiction to enjoin threatened breach of a contract of the United States (R. 85-86). However, specific performance of Government contracts may not be accomplished by indirection by enjoining a government officer from performing the act which it is alleged will constitute a breach of contract, since such a proceeding constitutes a suit against the United States. *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371; *Wells* v. *Roper*, 246 U. S. 335; *Goldberg* v. *Daniels*, 231 U. S. 218; *In re Ayers*, 123 U. S. 443, 503; see *Goltra* v. *Weeks*, 271 U. S. 536, 546; cf. Brief for the Petitioner, *Larson* v. *Domestic and Foreign Commerce Corporation*, No. 31, now pending decision, pp. 28-32, 39. Since title to and

possession of the property is concededly in the United States, this suit cannot be justified on the ground that property of the plaintiff is being unlawfully withheld by a government agent or such agent is threatening to trespass on plaintiff's property. See *Land* v. *Dollar*, 330 U. S. 731, 737, 738. Hence, as the dissenting judge concluded (R. 86), the United States is surely a necessary party to this suit.

4. Other questions of importance are presented by the decision of the court below, which continues in effect "until final disposition of the action" by the District Court the temporary injunction originally issued by that Court on June 4, 1948. The district court entered this injunction with the consent of both parties to give it time to consider respondent's motion for leave to file its amended complaint. (R. 63.) There was then no hearing on the question whether an injunction *pendente lite* should be granted and, since the order was entered by consent, no findings of fact or conclusions of law of any kind were made.[4] When the court denied the motion for leave to amend, it extended the injunction of June 4, 1948, for ten days. (R. 63.)

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[4] At the only hearing on an application for such relief which took place before the first appeal, the injunction was denied by the District Court and no appeal from that action was taken. The findings of fact and conclusions of law made by the Court following that hearing (R. 39-41) plainly require the refusal of injunctive relief. Although the motion for leave to file the amended complaint was accompanied by a motion for a preliminary injunction, the court concluded that since leave to file the amended complaint had been denied, the motion for a preliminary injunction was not properly before it.

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CONSTITUTION AND STATUTES:

U.S. Const., Art. IV, sec. 3 40
Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. 181, *et seq.* 3, 41

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plainly reversible error for want of supporting findings and conclusions. It is submitted that the Court of Appeals has no power to order the district court to disregard the rules of procedure promulgated by this Court for the governance of district courts.

Moreover, the direction of the Court of Appeals ties the hands of the district court throughout the course of the litigation. It leaves the district court without discretion or power to modify or to dissolve the injunction *pendente lite* regardless of how circumstances may change with the passage of time. It would also seem to leave petitioner without any possibility of relief if circumstances should change. The District Court would be required by the present decision to deny any application for modification or dissolution and any appeal from its action would probably be fruitless since the Court of Appeals could hardly reverse for obedience of its own command. The Court of Appeals would seem to lack power to alter its present judgment, unless the need for modification or dissolution of the injunction could be brought before it by an appropriate proceeding before the expiration of the present term of that Court. Hence, it is submitted that the extension of the interlocutory injunction until final disposition of the action constitutes such a clear abuse of discretion as to warrant invocation of this Court's supervisory power. Cf. *Landis* v. *North American Co.*, 299 U. S. 248, 257.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 60

JULIUS A. KRUG, DEPARTMENT OF INTERIOR,
Petitioner

v.

SHERIDAN-WYOMING COAL COMPANY, INC.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the Court of Appeals (R. 96-106) are reported at 172 F. 2d 282. Its opinion on a prior appeal (R. 30-34) is reported at 168 F. 2d 557. The opinions of the district court are found at pages 16-18 and 86 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1949 (R. 106-107). The peti-

in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit: * * * no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated * * *.

SEC. 3 [30 U. S. C. 203]. * * * any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

SEC. 4 [30 U. S. C. 204]. * * * upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked

tion for a writ of certiorari was filed on April 29, 1949, and was granted on October 10, 1949 (R. 109). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether a regulation of the Secretary of the Interior which merely instructed his subordinates as to the criteria which should govern them in making recommendations as to new coal leases upon the public domain created property rights in lessees of public coal lands which gave them standing to enjoin the leasing of other public coal lands to a third party.

2. Whether as construed by the court below the regulation is invalid because one Secretary of the Interior does not have authority to bind the Government to a single policy in disposing of its coal lands or to reduce by contract the discretionary duty and authority vested by statute in him and his successors with respect to the execution of new mineral leases.

3. Whether an officer of the United States may be enjoined from leasing Government lands on the ground that such act would constitute a breach of a contract with the United States not to lease such lands.

4. Whether the Court of Appeals, in reversing an order denying leave to file an amended complaint, so abused its discretion in directing contin-

out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.

SEC. 7 [30 U. S. C. 207]. * * * for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuation of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. * * * the Secretary of the Interior may permit suspension of operation under such lease for not to exceed six months

uance of a temporary injunction until final disposition of the action by the trial court as to warrant invocation of this Court's supervisory powers.

STATUTE AND REGULATION INVOLVED

Relevant provisions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. 181 *et seq.*, are printed in the Appendix, *infra*, pp. 65-71. 43 C. F. R. sec. 193.3 provides:

> *Showing required that an additional coal mine is needed.* The General Land Office[1] will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met.

STATEMENT

1. This case has been through the lower courts twice. Suit was originally filed on November 4, 1947, to enjoin the Secretary of the Interior from granting to the Big Horn Coal Company leases to mine coal from public lands (R. 19-23). Respondent's theory was (a) that a regulation of the Secretary of the Interior (43 C. F. R. sec. 193.3—directing the General Land Office to "make fav-

[1] Effective July 16, 1946, the General Land Office was abolished and its functions transferred to the Bureau of Land Management by Reorganization Plan No. 3 of 1946 (11 F.R. 7875; 7876; 7776).

orable recommendation * * * [for issuing a lease of public coal lands] * * * only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met"—precluded the Secretary from issuing leases of public coal lands except those as to which there could be shown an actual need which could not otherwise be reasonably met; (b) that the leases applied for by the Big Horn Coal Company would be void and illegal because there had been and could be no finding of actual need as required by the regulation; and (c) that respondent, which claimed already to have been injured by competition from the Big Horn Coal Company's operations on state-owned lands, was within a "protected class" established by the regulation and would be irreparably injured by the granting of leases to the Big Horn Coal Company to operate on federally-owned lands (R. 22).

The detailed facts, as they appear in the original complaint and exhibits attached thereto (R. 19-23, 57-84), may be summarized as follows:

Respondent is engaged in the mining and distribution of sub-bituminous coal (R. 19). The Big Horn Coal Company carries on a similar business in competition with respondent, its coal being obtained from mines under a lease from the State of Wyoming dated December 2, 1943, which was as-

ever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal * * * entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 29 [30 U. S. C. 186]. * * * any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes. * * *

SEC. 30 [30 U. S. C. 187]. * * * The lessee may, in the discretion of the Secre-

signed to it by the Big Horn Construction Company on January 6, 1944, shortly after the incorporation of the coal company (R. 19-20). Prior thereto, on December 18, 1943, the Big Horn Coal Company, then in the process of being incorporated, filed an application for a coal lease of federal lands adjoining the state lands already under lease, and later in 1945 applied for additional lands (R. 20, 63). On January 16, 1946, after publication of notice according to statutory requirement, the lands were offered for coal leasing purposes at public auction and Big Horn was the only bidder (R. 20, 59). However, a lease was not awarded at that time because of protests filed by respondent and others on the ground that the regulation of the Secretary published as 43 C. F. R. sec. 193.3 (*supra*, p. 3) prohibited the leasing of the lands involved except on a finding that an additional coal mine was needed (R. 59).

After hearing, the Bureau of Land Management dismissed the protests on the ground that the regulation requiring a showing of a need for an additional mine did not apply where, as in the case of the Big Horn Company, additional lands were sought for an existing mine whose deposits were becoming exhausted (R. 20-21, 59-61). The Under Secretary approved this decision (R. 61).

Thereafter, respondent moved for a rehearing within the Department on the ground that the case should be treated as one in which issuance of the

tary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain * * * such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare * * *.

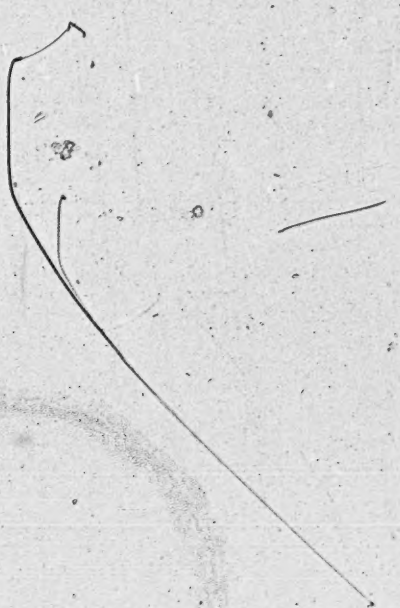
SEC. 32 [30 U. S. C. 189]. * * * the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *.

SEC. 37 [30 U. S. C. 193]. * * * the deposits of coal * * * herein referred to, in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in this Act * * *.

SEC. 39 [30 U. S. C. 209]. The Secretary of the Interior for the purpose of encouraging the greatest ultimate recovery of coal, oil, or gas and in the interest of conservation of natural resources is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion

federal lease would create a new mine whose production would tend to supplant that already existing in the competitive area; it asserted that Big Horn had started a new mine on the state-owned lands knowing that those coal deposits were inadequate and was merely using the lease of the state-owned lands for the purpose of avoiding or evading the effect of the regulation (R. 62-63). The Under Secretary denied this motion, stating that respondent's position ignored events subsequent to Big Horn's application which showed that, without using federal lands, Big Horn had successfully opened a large mine and would be driven out of business if the regulation were applied as urged by respondent. The Under Secretary pointed out that to apply the regulation in such a case would be contrary to its purpose because, as appeared from past decisions, it was promulgated not only because of public interest in maintaining a healthy bituminous coal industry by avoiding overproduction, but also because of the interest of the Government in the conservation and fruitful exploitation of its mineral properties; that the Government as a proprietor of coal lands on the public domain was in no position to control the industry by its policy in the disposition of federal coal lands, however wise; and that while it would endeavor to prevent recurrence of the past devastating conditions of overproduction in the industry, it would not do so at the expense of an arbitrary termination of a

thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto. * * *



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competing coal business which had been successfully established on non-federal lands, and was, at the time its applications for federal leases were heard, running out of coal reserves, since one of the purposes of the regulation was to assist in keeping in operation mines already in existence (R. 64-66). The Secretary of the Interior denied a motion for exercise of his supervisory power and refused to reverse the decision of his subordinates in this matter. He pointed out that whatever his decision might have been at the date Big Horn first applied for a lease, at the time the applications were acted upon the Big Horn Company had successfully established a large, going business enterprise on state-owned land without resort to the use of federal coal lands (R. 66-70).[2]

Upon these facts, respondent alleged in its complaint that issuance of the leases to Big Horn would be "void and illegal" because there was, and could be, no finding "of the regulatory requisites in the premises" (R. 22).

Petitioner moved to dismiss the complaint on the grounds that it did not state a cause of action, that

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[2] The Secretary pointed out (a) that Big Horn's state-owned coal lands were next to the federal coal lands which it sought to lease, and (b) and that the state coal was insufficient to supply the company's needs if it were to remain in business (R. 66-69). The Under Secretary's decision likewise stated that Big Horn needed the "coal deposits of the United States", and the granting of a lease on the adjacent federal coal lands "would accommodate the expansion of an existing mine which is running out of coal reserves." (R. 64.)

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for coal which cannot otherwise be reasonably met." The court below held that, as interpreted by the Secretary of the Interior in previous cases, the regulation "precluded the grant of leases to these lands unless market need for additional coal was shown," that the regulation as thus interpreted, though not specifically incorporated in the leases, was one of the conditions of leases of federal coal lands and created a contract right in each lessee to be one of a limited number of lessees.

The regulation is clear upon its face that no such right was, or was intended to be, granted to federal coal lessees. It is addressed only to subordinates of the Secretary of the Interior, places no restraint on the Secretary, and does not prevent him from issuing leases to those who do not meet its requirements. Cf. *Williams* v. *Wingo*, 177 U. S. 601, 602-603. Moreover, the previous decisions of officials in the Department of the Interior, applying the regulation, do not warrant the conclusion that the discretion of the Secretary of the Interior to lease government lands was circumscribed by the regulation, or that the regulation, as interpreted, created or was intended to create any right in federal coal lessees to be free of competition except in cases where a showing of a market need for coal could be made. Nor do they warrant a conclusion, contrary to the determination of the Secretary in the present case, that the regulation applies to an applicant who prior to the approval of its applica-

tion for a federal lease, had successfully established a going coal mining business on adjacent nonfederal lands but whose deposits were becoming exhausted.

The effect given the regulation by the court below is contrary to established principles for construing legislation or regulations alleged to constitute a public grant or to operate as a restriction on the power of government by the creation of private rights. Such provisions are to be strictly construed against the grantee and in favor of the public. In the light of this principle, the instant regulation, whether applicable to action by the Secretary or only to his subordinates, is no more than an internal "guide post" in passing on applications for coal leases and confers no litigable rights on those who may benefit thereby. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127. Even if the regulation had clearly stated that no leases would be granted except upon the showing set out therein, it would have been only a legislative declaration of current policy and would have vested no rights in one who thereafter procured a lease. This would be true even if the purpose and sole effect of the regulation were to limit competition in coal production (which the regulation's history makes clear is not the case). Cf. *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 139-141. Moreover, the general principle that a person's enjoyment of a benefit under public legislation cannot vest him

with the legal right to have the benefit perpetuated applies with even greater force where, as here, the effect of recognizing such a legal right is to restrict the power of the government in the disposition of its property. Cf. *Reichelderfer* v. *Quinn*, 287 U. S. 315, 318-321.

The decision below irrevocably commits the Government, so long as there are leases outstanding which have been made since the regulation was promulgated in 1934, to a policy of granting coal leases solely upon consideration of whether an additional mine is needed and that need cannot otherwise be reasonably met, regardless of the extent to which other circumstances may make leasing desirable or necessary. Under the court of appeals decision, even the Congress could not change that policy without violating contract rights of federal coal lessees. In view of the repeated holdings of this Court that "statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest," the decision below is clearly erroneous.

B. The authorities cited in the majority opinion below do not support its conclusion that the regulation created contract rights in respondent to be free from competition. This is not a case where the United States has induced persons to become coal lessees upon the specific and explicit promise that competition will be restricted. Nor is it a case

respondent had no standing to sue, and that the United States was an indispensable party (R. 24-25). On November 17, 1947, the district court dismissed the complaint on the ground that it did not state a cause of action (R. 84). The district court was of the view that respondent had no standing to sue, that the Secretary's power to grant coal leases under the Mineral Leasing Act (30 U. S. C. 201) is discretionary and not subject to judicial review, and that the regulation in question was a declaration of policy which did not diminish or restrict the Secretary's discretionary powers (R. 29-30).[3] The court expressed the opinion, however, that the United States was not a necessary party.

2. Respondent appealed from the judgment of dismissal and on March 29, 1948, the Court of Appeals affirmed on the ground that the claim asserted was a general right of the coal industry to be protected against competition and that respondent, as a member of the coal industry in general, had no standing to sue. *Sheridan-Wyoming Coal Company, Inc.* v. *Krug*, 168 F. 2d 557 (R. 31-34). Although the parties had argued the merits of the matter, the appellate court declined to decide whether respondent, as lessee of federal coal lands,

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[3] The district court expressed no opinion at the time of entering the order of dismissal. Its views are found in an opinion delivered from the bench and the conclusions of law filed in passing on a motion by respondent for a preliminary injunction (R. 16-18, 29-30).

could maintain the suit, because the original complaint did not allege that respondent was a lessee (R. 33). However, upon motion by respondent (R. 35), it thereafter amended its judgment to permit the trial court to entertain a motion to amend the complaint, "with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper" (R. 36).

3. Upon remand, respondent moved for leave to file an amended complaint (R. 49-50), which was substantially the same as the original complaint (*supra*, pp. 4-7) except for allegations (a) that respondent is a lessee of public coal lands,[4] (b) as to its investment under the lease, (c) that the Department of the Interior, since the promulgation of the regulation relied upon, had not issued coal leases in the absence of a finding of a need for an additional mine, and (d) that the regulation and the practice thereunder were part of the consideration bargained for and obtained in the execution of respondent's lease (R. 51-52).

Petitioner opposed the granting of the motion, and on July 6, 1948, it was denied by the district court on the ground that the proposed new matter added nothing material to the claim and that granting leave to file the amended complaint "would be idle and would needlessly prolong the

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[4] Respondent's present lease was issued in September, 1943 (R. 51). It had been a lessee of federal coal lands for many years prior thereto (R. 1).

litigation" (R. 86-87). Upon a second appeal by respondent, the Court of Appeals, on January 31, 1949, reversed the trial court for refusing to allow respondent to file an amended complaint and directed the trial court to allow the filing of that complaint and to deny petitioner's motion to dismiss insofar as it rests upon the ground that respondent has no standing to sue (R. 97-106).[5]

At the end of its opinion, the court of appeals summarized its reasoning (R. 104-105). In paraphrase, it was as follows: The Secretary was empowered to withdraw the lands from leasing and therefore could impose conditions upon which he would issue leases. Since the regulation was published in the Code of Federal Regulations, it had the force of a statute until modified or repealed. Rightly construed and as it had been construed until the Big Horn application, it meant that leases would not be issued in the absence of a showing that an additional coal mine was needed. Since

[5] Respondent had both taken an appeal as of right and applied for allowance of a special appeal under Section 17-101, District of Columbia Code. On September 17, 1948, the special appeal was denied, together with a motion to dismiss the appeal as of right (R. 94). As was pointed out in the petition for certiorari (p. 6), it is believed that this latter order was erroneous, but it is not urged that the judgment should be reversed on this ground since the court below probably had power to entertain the special appeal under the then Section 17-101 of the District of Columbia Code, and a reversal on that ground would only prolong this litigation if, as would be probable, the amended complaint were filed as a new suit.

respondent's lease recited, in its introductory clause, that it was made subject to the Leasing Act and since 43 C. F. R. sec. 193.3 was valid under that Act, the regulation was one of the conditions of the lease contract. That contract conferred and was intended to confer on respondent the right to be one of a limited number of lessees and, as possessor of that valuable right, respondent could sue for its protection. The Secretary's wide discretion under the Leasing Act does not allow him "to violate or ignore an existing departmental regulation which established one of the conditions upon which he entered into a contract of lease." (R. 105).

Judge Edgerton, who had concurred in the result on the first appeal, this time dissented, saying (R. 106):

> Our former judgment was that the District Court might grant or deny a motion to amend the complaint "as in its discretion seems proper." That judgment became final long ago. This court now reverses it and required the District Court to grant the motion. This reversal seems to me not only inconsistent with orderly procedure but probably beyond our authority.
>
> I agree with the District Court that the proposed amendment of the complaint would add nothing material. On the former appeal we did not undertake to decide that question. I think the Department regulation on which

this court now relies was not intended to be, did not appear to be, and was not a term or condition of appellant's lease. Its apparent purpose and effect were not to increase the rights of lessees, but to limit the expectations of applicants for leases. It did not purport to control the discretion of the Secretary in making "favorable recommendations." Moreover the United States is a necessary party when suit is brought to prevent the leasing of its lands.

4. A temporary restraining order issued *ex parte* by the district court, at the time of the institution of the suit, was continued until the entry of a temporary injunction by the court of appeals, pending the disposition of the first appeal (R. 89-90). Upon the first remand, the district court, on June 4, 1948, with the consent of the petitioner, granted another temporary restraint so that time would be available for consideration of the motion to amend the complaint (R. 108-109). This restraint was continued by the court of appeals pending final disposition of the second appeal (R. 92). On reversing the district court in the second appeal, the court of appeals directed continuance of the temporary injunction until final disposition of the case by the trial court (R. 106). The detailed facts showing how the issuance of the lease has been restrained are set out in the Argument, *infra*, pp. 53-57.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that respondent had standing to sue to enjoin the Secretary of the Interior from making a lease of federal coal lands.

2. In instructing the district court to deny petitioner's motion to dismiss insofar as it rests upon the ground that respondent has no standing to sue.

3. In holding that there is jurisdiction to enjoin the Secretary of the Interior from executing a lease of public lands of the United States.

4. In reversing the order of the district court.

5. In ordering continuance of the injunction until final disposition of the case by the district court.

SUMMARY OF ARGUMENT

I

A. A regulation of the Secretary of the Interior —promulgated under the authority vested in him by the Mineral Leasing Act to lease federal coal lands and to make such regulations as may be necessary to carry out the purposes of the Act, and published in the Federal Register—stated that the General Land Office "will make favorable recommendation" for the granting of leases on federal coal lands "only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need

where a statute has granted all aggrieved persons a special right to obtain a review of administrative orders benefiting their competitors. And it is not a situation where a public utility having an exclusive right against persons engaging in the same business without a permit or under a void permit may complain of competition under a permit whose issuance was illegal under the Fourteenth Amendment. These cases, therefore, do not help respondent to establish a standing to sue, absent a prior showing that it has been given, by contract or statute, a special right to be free from competition. Such a special right it does not have.

II

The effect of the decision below is to create a negative easement in the form of a restrictive covenant on all other federal coal lands—and to restrict the power of Congress to dispose of public property, as well as of Secretaries of the Interior to change the policy governing issuance of coal leases. The Secretary of the Interior has been given no authority which would permit him to create such rights, or to act so as to bring about such a restriction, or to circumscribe the discretion of his successors. Moreover, the express terms of the Mineral Leasing Act provide affirmative proof, if any were needed, that Congress did not intend to grant such authority.

III

The United States is a necessary party to any suit against property in which it has an interest, and it is likewise indispensable to a suit seeking specific performance of its contracts. Thus whether the instant suit be treated as an action to enforce a restrictive contract provision or as a suit to establish the existence of a property right in the nature of a negative easement, it will not lie against a government officer. This result is not changed by the fact that only negative relief is asked, or that the alleged governmental contract constitutes a negative rather than an affirmative promise, i.e., an agreement not to lease public lands. The contract, if any, is still a contract of the United States, and the coal lands belong to it and not to petitioner.

Cases such as *United States* v. *Lee*, 106 U. S. 196, and *Land* v. *Dollar*, 330 U. S. 731, where the governmental officer was dealing with property in which the plaintiff claimed the Government had no interest, obviously cannot support the present decision which attempts to control the leasing of land admittedly owned by the United States. The claim that the government officer had no statutory authority to grant a new lease does not alter the fact that the plaintiff is seeking to establish a right to restrict the leasing of federal lands—a question which cannot be determined in the absence of the United States.

it." *Tennessee Power Co.* v. *T. V. A.*, *supra*, 141; cf. *Williams* v. *Wingo*, 177 U. S. 601; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.*, 168 U. S. 349; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667; *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 473-476; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479-484.

These authorities make it abundantly clear that there is no warrant for reading the respondent's lease as if it had specifically provided, "The United States will not lease other federal lands for use for coal mining purposes in competition with the lands here leased except upon a showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." Yet that is the result of the decision below.[9]

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[9] Although it purported merely to determine that respondent had standing to sue and that the motion to amend the complaint should be granted (R. 105), the court of appeals also indicated its disapproval of the Interior Department's interpretation of the regulation as inapplicable where a federal lease was needed to continue an existing mine in operation (R. 103). This issue goes to the merits of respondent's case, rather than its right to maintain this action, but we should like to point out that, as the Under Secretary explained in approving Big Horn's lease application, none of the earlier decisions involved a situation where a going coal mining business had been established under leases issued by a State, and "while the Department in the interpretation and application of its regulation has endeavored to prevent the creation of conditions of excessive competition, it has not

IV

In reversing the order denying leave to amend the complaint, the court of appeals directed that a temporary restraint previously issued by the district court, with petitioner's consent, "be continued until final disposition of the action by the trial court." Such a summary conversion of the original order into an injunction *pendente lite* was unwarranted, and in so doing the court of appeals exceeded its jurisdiction. For an appellate court, like a district court, has no power to enter an injunction *pendente lite*, without hearing, findings of fact, or conclusions of law, and it is likewise without authority peremptorily to require a district court to issue such a bare preliminary injunction. The procedure followed by the court below deprives litigants of the exercise of judicial discretion to determine whether, on all the relevant circumstances, equity injunctive power should be exercised. Moreover, because of the manner of entry of the order, it would seem to leave petitioner without any means of seeking relief if facts originally thought to justify an injunction should change.

ARGUMENT

I

The Regulation Pertaining to the Leasing of Federal Coal Lands Vests No Rights in Lessees of Other Federal Coal Lands.

The Court of Appeals upon the first appeal held, quite correctly, that respondent had no standing to enjoin the issuance of the lease to Big Horn merely

B. *The authorities cited by the majority opinion below do not support its result.*—1. In its effort to read the regulation into the lease and thus create an enforceable contract right, the court below relied upon *Wood* v. *Lovett*, 313 U. S. 362 (R. 104). In that case, a state statute provided that no sale of land acquired by the state for nonpayment of taxes should be set aside because of any irregularity or informality in the process of assessing and levying the taxes or in the sale of the property for delinquent taxes. As this Court held, that statute was

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undertaken to remove competition already established" (R. 65). The Secretary of the Interior, in denying a motion for exercise of his supervisory powers, concurred in the interpretation placed on the regulation by his subordinates (R. 66-70). And in a letter to the chairman of the House Committee on Public Lands dated June 9, 1947, regarding a bill to amend the Mineral Leasing Act to increase the maximum size of a coal leasing tract, the Acting Secretary, with obvious reference to this regulation, stated, "Coal mining is and long has been a sick industry because of overproduction. For the past 15 years this Department in recognition of this fact has issued new coal leases or permits only upon a competent showing of the need for a new source of supply *or to continue an existing mine in operation.*" [Italics supplied.] U. S. Code Cong. Serv., 80th Cong., 2d sess., p. 1642. See also *supra*, pp. 5-7.

This interpretation is neither unreasonable nor plainly wrong, at the least, and settled doctrine would seem to require such determinations of the Interior Department relating to the public lands to be accepted by the courts, in injunction or mandamus actions. *Work* v. *Rives*, 267 U. S. 175, 177-178; *Hall* v. *Payne*, 254 U. S. 343, 347-348; *Ness* v. *Fisher*, 223 U. S. 683, 691-692; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324-5; *Wilbur* v. *United States*, 281 U. S. 206, 218-222; cf. *Decatur* v. *Paulding*, 14 Pet. 497, 515.

because it would be injured by the competition of a new leasehold issued in alleged violation of the regulation (R. 31). Upon the second appeal, the majority opinion, having noted that the regulation was issued under authority of the Mineral Leasing Act and that the lease to respondent made reference to that Act (by providing that it was made "under, pursuant and subject to" the provisions of the Act), concluded that the regulation was in effect incorporated into the lease. On that premise, it held that the lease contained an agreement that the United States would limit future coal-mining leases of public lands to instances in which there was a satisfactory showing of a need for coal which could not otherwise be met, and hence that respondent had standing to maintain this suit by virtue of "its rights as owner of a property right by contract * * *." (R. 98.)

A. *The regulation does not purport to vest any rights in respondent or other lessees, and it would be contrary to settled principles of construction to give it the effect prescribed by the court below.*— 1. A reading of the regulation is sufficient to refute any contention that an agreement to limit future coal leases was entered into with respondent, or that the regulation vested or was intended to vest in lessees of federal coal lands a right to be free from competition under subsequent leases on other federal lands except where there could be shown an actual need for additional coal. The regulation

states that "the General Land Office will make favorable recommendation" on lease applications only where such a showing is made. It does not state that leases will not be issued unless the showing is made. It makes no promise that holders of existing leases or anyone else will be assured freedom from competition. It does not purport to guarantee that respondent's lease will be "one of a limited number of leases" (R. 105). It is nothing but a directive by the Secretary of the Interior to his subordinates and relates only to their *recommendations.* Its publication in the Code of Federal Regulations was merely notice to prospective lessees that they would be required to show that an additional mine was needed if they expected to obtain a favorable recommendation from the General Land Office. Neither the regulation nor its publication purports to state what action will be taken ultimately, or to bind the Secretary. As Judge Edgerton stated in his dissent below (R. 106), "Its apparent purpose and effect were not to increase the rights of lessees, but to limit the expectations of applicants for leases. It did not purport to control the discretion of the Secretary in making leases, but only that of his subordinates in making 'favorable recommendations' ".

The majority opinion did not controvert this plain meaning of the regulation by reference to any of its language. Instead, the court based its extraordinary construction of the regulation on the assertion that the Secretary of the Interior

intended to be and was an offer by the state to each prospective purchaser of a title which was to be immune from attack on grounds theretofore available. 313 U. S. at 368-9. Consequently, the protection it afforded to the title necessarily inured to every purchaser acting under it and constituted a contract with him.

But the regulation in the present case was certainly not intended as an inducement to persons to seek mineral leases and operate coal mines—much less a promise that no further leases would be granted except upon a showing of necessity for an additional mine—and, as we have shown (*supra*, pp. 19-33), it would violate the regulation's provisions and purpose, as well as the pertinent principles for interpreting such public grants, to read it in that way. And there is, of course, no rule that every statute which results in a benefit to those who choose to place themselves in a position to take advantage of its provisions constitutes a contract between the Government and the individual. Cf. *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379. On the contrary, the *Powers* case shows that even a statute which is intended to induce action on the part of those who expect to benefit thereby may not give rise to contract rights. In that case, a statutory tax-exemption applicable to railroads which might thereafter build and operate a line within a certain area was repealed after the plaintiff railroad had constructed its line. The contention that the act created an irrevocable contract

"had consistently held that it precluded the grant of leases to these lands unless market need for additional coal was shown" (R. 104). But the fact that officials of the Department of the Interior have in the past denied applications for coal leases primarily on the basis of this regulation is no more than would be reasonably expected to follow the announcement of a policy to guide recommendations, and cannot, of course, operate to vest rights not already granted by the regulation itself. The denial of these applications on the ground that the regulation precluded their being granted and that "revision of the department rule *at this time* would be harmful to the lignite coal industry and not in the public interest" (R. 74),[6] or that "the application advances nothing which would warrant revision of the regulation" (R. 77), has no greater effect than a series of discretionary denials by the Secretary, on the ground that there was no need for additional coal mines, would have had in the absence of any regulation at all. Consistent exercise of his discretion so as to implement the same general policy as is implicit in this regulation would not preclude the Secretary from adopting a new policy or altering the old one (see *infra*, pp. 42-43). Nor can it be said that a consistent line of rulings in accordance with the recommendations of his subordinates would convert a direction to the

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[6] Unless otherwise noted italics have been supplied throughout this brief.

lower echelons of the Department to conform their recommendations to the given policy into a rule binding the Secretary's own discretion and determinations. The Secretary retained the power to issue mineral leases in himself, and nowhere did he purport to regulate his own action in this field.

Even if the Secretary had delegated to the General Land Office authority to issue leases, but had prohibited the issuance of leases except under the circumstances described in this regulation, the regulation would not have tied the hands of the Secretary or prevented him from granting leases without a showing of actual need, whenever in his judgment he saw fit. *Williams* v. *Wingo*, 177 U. S. 601, 602-603. In that case, the state legislature gave the county courts power to license ferries and by the same act forbade them to license a second ferry within half a mile of one already established. After the plaintiff had established a ferry under a license from the county court, the legislature granted the defendant the right to maintain a ferry within less than one-half mile of plaintiff's ferry. In holding that the part of the statute prohibiting the licensing of a second ferry within one-half mile of one already established created no contract rights between plaintiff and the State, this Court pointed out that the statute placed no restraint upon legislative action, was not binding on the legislature itself, and did not prevent it from authorizing the second ferry. Only the county courts were so restricted. The regulation in the pres-

ent case, which does not purport to go so far as the statute in the *Wingo* case, can have no greater effect.

2. Assuming, however, that the regulation did prescribe a rule to be followed by the Secretary, and not only by his subordinates, there is nothing in its purpose or history which would grant a right to an existing lessee to prevent the issuance of a lease to another applicant in contravention of the regulation's terms. Both the regulation and the decisions under it were directed mainly toward a policy of disposing of government coal lands in such a manner as would be to the greatest advantage of the Government as a landowner and of the people of the nation as consumers. They were not directed toward protecting the competitive status of existing lessees. In fact, the Departmental decisions denying applications show that protection of the coal industry from overproduction (much less federal lessees alone)—through the limitation of the number of federal lessees—was not the sole or even the primary purpose of the regulation nor the sole or primary reason for denying the applications. And to the extent that the Department was interested in preventing overproduction it was not out of solicitude for the private position of existing lessees but in order to preserve public resources and to protect the general public. See R. 64-65, 72-74.

The Government's interest as proprietor of the

coal lands has been uniformly stressed. As was stated in one of the leading Departmental decisions applying the instant regulation (R. 74):

> Were the departmental rule to rest alone upon the general public interest it would be a reasonable and appropriate measure. But it finds firmer support. *With respect to coal deposits upon the public domain, the Government assumes the capacity of a proprietor who desires the fruitful exploitation of the natural resources upon his lands.*
>
> Overproduction in the bituminous coal industry strikes at the prosperity of producers large and small, old and new. Overhead costs are slashed and then, as the effects of overproduction accumulate, impairment settles upon the ability of producers to meet fixed commitments. *As a royalty owner the Government suffers.* Finally, with both capital and income exhausted, many producers give up the losing battle. In the light of conditions which exist in the industry, no market exists in which these producers can dispose of their mines and recover even a portion of their investments. *Again the Government is the loser,* for an abandoned mine frequently deteriorates beyond the point where it will be profitable within the foreseeable future to reopen it for the recovery of the merchantable coal left in the ground. Props give way, roofs collapse, water fills the entries and passageways, rails and equipment waste away in rust and corrosion. *To the consumers of the Nation good coal once potentially available through opera-*

tion of the mine is lost and to the Government the royalties it might have brought are gone.

Moreover, as was pointed out in that decision, the Department of the Interior was not entrusted with the establishment or administration of general governmental policy relating to the lignite coal industry (R. 74). Neither was it in a position as proprietor of federal coal lands to dominate the industry and to eliminate the effects of overproduction (R. 74). However, it was said that the Department would not knowingly contribute to an unfortunate situation and therefore "this consideration [the effect of overproduction on the coal industry] *taken in conjunction with* the position of the Department as a present and potential royalty owner," indicated that the department rule (embodied in section 193.3) should not be revised at that time. And with similar reference to the Government's status as royalty owner, and the purpose of the present regulation to protect that position, the General Land Office pointed out, in 1934, in transmitting the instruction here involved to the various land offices (Circular No. 1318, February 1, 1934, 54 L. D. 352), that previous regulations had required applicants for federal coal leases to submit a statement of the general situation of the land with respect to other mines and outlets to market, but that many applications failed to do so, and it had been found that for various causes many lessees were unable to comply

with the minimum tonnage required by their leases and numerous requests were made for relief under the tonnage requirements, as well as in the matter of payment of annual rentals.

3. Thus, the regulation, as appears both from its language and from the decisions applying it, is no more than an internal housekeeping rule laid down as a guidepost in carrying out the discretionary power vested in the Secretary of the Interior to dispose of federal coal lands, and, like the statute in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, creates no litigable rights in those who may benefit thereby. In the *Perkins* case, it was contended that a statute providing for the sale of supplies to the Government by means of public bids gave prospective sellers a right to bid and sell to the Government free from compliance with a condition imposed by the Secretary of Labor acting under an allegedly erroneous interpretation of another statute. The language of this Court (p. 127) in rejecting that contention is apposite here:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and

which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.[7]

The court below, as we have said (*supra*, pp. 10-11, 20-24), has started out by treating the regulation as if it read as follows: "Leases of coal lands will be granted only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met." Having thus construed the regulation, the court went on to hold that it had the effect of a statute and became one of the conditions of the lease (R. 104). Even if the regulation did so provide or even if it had been so construed by the Department of the Interior, it would be only a declara-

[7] See also *United States* v. *New York and Porto Rico Steamship Co.*, 239 U. S. 88, 92 (statute directing Government contracts to be in writing) and *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78 (advertising and low-bidder legislation).

tion of legislative policy for the governance of that Department, like the Walsh-Healey Act, and would vest no justiciable rights in respondent. Cf. *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 139-141; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321-322; *Stanislaus County* v. *San Joaquin C. & I. Co.*, 192 U. S. 201, 205-211; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387; *Williams* v. *Wingo*, 177 U. S. 601; *Newton* v. *Commissioners*, 100 U. S. 548, 559; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659, 667; *Salt Company* v. *East Saginaw*, 13 Wall. 373. See *infra*, pp. 29-33.

4. "Statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest." *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321.[8] It is fundamental that public grants are to be strictly construed against the grantee and in favor of the public. *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248, 257; *Keefe* v. *Clark*, 322 U. S. 393, [illegible]; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 321; *Larson* v. *South Dakota*, 278 U. S. 429, 435; *Darling* v. *Newport News*, 249 U. S. 540, [illegible]; *Water Company* v. *Knoxville*, 200 U. S. 22, 31-33; *St. Anthony Falls Water Power Co.* v. *St. Paul*

[8] The court below made much of the fact that the regulation was published in the Federal Register as one of general effect, and concluded that it had the force and effect of a statute (R. 100, 104).

Water Comrs., 168 U. S. 349, 372; *Newton* v. *Commissioners*, 100 U. S. 548, 561; *Turnpike Co.* v. *Illinois*, 96 U. S. 63, 68-69; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546-548; cf. *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 385-387. This rule applies both in determining the existence of the contract or grant and, where the contract exists, in determining its scope and extent. "A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute." *Williams* v. *Wingo*, 177 U. S. 601, 603. "Nothing passes by implication." *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 546. The legislative act must be "plain and beyond all doubt." *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.*, 168 U. S. 349, 372.

In the *Reichelderfer* case, *supra*, a statute under which certain lands were purchased or condemned for park purposes provided that the lands were "perpetually dedicated and set apart as a public park"; benefits were assessed against surrounding lands to the extent that they were "specially benefited by reason of the location and improvement" of the park. This Court held that surrounding owners against whom benefits had been assessed acquired no right to have the land used for park purposes, saying (pp. 318, 319):

> * * * By dedicating the lands thus acquired to a particular public use, Congress declared a

> public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses. The dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years. * * * if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise.

In answer to the contention that by virtue of the assessment the surrounding owners had paid for the right to enjoy the special benefits accruing from the maintenance of the park in perpetuity, the Court said (p. 321):

> * * * the dedication of the park, a declaration of a present purpose, does not imply a promise to neighboring land-owners that the park would be continued in perpetuity. * * * The benefit of a governmental obligation which the statute neither expresses nor implies obviously was not to be assessed.

So here, if Congress had enacted a statute saying flatly that no federal coal lands would be leased except upon a showing of necessity for additional coal mines, it would amount to no more than a declaration of policy as to the manner in which the government would dispose of its property and could be revoked in whole or part without resulting liability to those benefited by the original statute.

The canon of strict construction would prevent such a statute from being construed as a grant of private rights to lessees, and would stress the public interest, rather than the competitive status of other mines, as the dominant purpose of the limitation. There is even stronger reason for interpreting the present regulation—speaking, as it does, solely in terms of recommendations by his subordinates to the Secretary—in the same way. *Supra*, pp. 20-27.

5. But even if the avowed purpose of such a statute or regulation were to restrict competition in the coal industry and thereby encourage and benefit federal coal lessees, it would create no rights in those who subsequently entered into leases of federal coal lands. Public utility statutes which require the obtaining of a certificate of public convenience and necessity as a condition of doing business do not confer a right to have that policy continued, and "afford[s] the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field." *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 139. "Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to alteration at the will of the legislature. The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in

between the state and such railroads as might thereafter comply with its terms was disposed of on the ground, first, that there was no adequate expression of actual intent on the part of the State to set change of position by the railroad against a promise not to tax, the Court saying (p. 387) "No doubt the State expected to encourage railroad building, and the railroad builders expected the encouragement, but the two things are not set against each other in terms of bargain." Secondly, the court took the broader ground that in view of the subject matter, "the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law".

As we have shown, the regulation here involved obviously was not intended as an inducement to prospective lessees. Moreover, it was promulgated not to carry out any power granted the Secretary

of the Interior to alleviate the evils arising out of overproduction of coal, but to carry out the powers granted the Secretary to lease federal mineral lands. And even if it could be said that respondent would be justified in acting in reliance upon the regulation, it is "intolerable" that it be allowed to set up a contract which restricts the Secretary and even Congress in future dispositions of government coal lands.

2. It is thus clear that respondent does not, as the court below put it, have a status "of one claiming a property right by contract, threatened with invasion" (R. 98; 105). Respondent argues (Br. in Opp. 18) that it has a second basis for suit, which it defines as "the special interest arising from respondent's property status as a regulated member of a special class," citing *Frost* v. *Corporation Commission*, 278 U. S. 515; the *Chicago Junction* case (*Baltimore & Ohio R. R. Co.* v. *United States*, 264 U. S. 258), and cases relating to review of orders of the Federal Communications Commission.[10] And respondent refers to the regulation as "restricting an entire industry — Federal coal lessees—in the interest of the public" (Br. in Opp. p. 16), and refers to itself as a member of a "regulated, restricted and limited class" (Br. in Opp.

[10] *Federal Communications Comm'n* v. *National Broadcasting Co.*, 319 U. S. 239; *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U. S. 4; *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470.

20). Although the court below relied upon the cited cases upon the second appeal (R. 105), their irrelevance is plain. Both the *Chicago Junction* case and the *Communications Commission* cases were based upon explicit statutory provisions giving parties aggrieved by action of the regulatory agency a right to appeal to the courts.[11] Indeed, as this Court was at pains to point out in *Federal Communications Comm'n* v. *Sanders Radio Station,* 309 U. S. 470, 475, the Communications Act "is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." The competitor's standing to appeal was upheld only because the Court felt that it would have to read an express provision out of the statute in order to deny the right of appeal, 309 U. S. at 476-7.[12]

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[11] That the *Chicago Junction* case is based solely on the explicit statutory provision clearly appears from this Court's decision in *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 483-484.

[12] As the Court of Appeals held on the first appeal (R. 33-34), the fact that respondent was permitted to protest, before the Department, the issuance of a lease to Big Horn does not indicate, in any way, that respondent has any sufficient legal interest to invoke judicial aid in preventing the award of the lease. Cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 117-118. Unlike the situation in the *Sanders* case, there is here no Congressional act granting the right of judicial review to any "aggrieved person" or person "whose interests are adversely affected" by the administrative decision, and respondent is forced to justify its suit under the traditional rules as to standing-to-sue and legal rights.

An analysis of *Frost* v. *Corporation Commission*, 278 U. S. 515, demonstrates that respondent's present argument is simply another form of the contention rejected upon the first appeal, i.e. that any member of the coal industry had standing to challenge the issuance of a lease to Big Horn. The *Frost* case involved a business, cotton ginning, which had been declared to be a public utility and which could not be engaged in without a license. The Court held that the holder of a license had an exclusive right against "any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit" (278 U. S. at p. 521). Here, there is no regulation of an industry. It is perfectly legal for Big Horn Coal Company or anyone else to engage in the coal business in competition with respondent. The regulation is based not upon any governmental power to regulate and to restrict competition in the field of public utilities but upon the authority of the United States as owner of the public domain. The lessees of federal coal lands have no greater rights to be free of competition from other federal coal lands than do other members of the coal industry unless it be by virtue of their contracts, i.e., unless it is concluded that the regulation constituted an agreement, incorporated in their leases, that the United States would not so use its lands. Respondent's argument (Br. in Opp. p. 20) that "apart from its contract rights, inde-

pendently" it has standing to sue, is therefore erroneous for the same reason that no other member of the coal industry can complain of competition (R. 31).[13]

The decision below irrevocably commits the government—so long as there are leases outstanding which have been made since the regulation was promulgated—to a policy of granting coal leases solely upon consideration of whether an additional mine is needed and that need cannot otherwise be reasonably met, regardless of the extent to which other circumstances may make leasing desirable or necessary. Upon the theory of the court below, even the Congress could not change that policy without violating contract rights of federal coal lessees. In view of the repeated holdings of this Court that "statutes said to restrict the power of government by the creation of private rights, are, like other public grants, to be strictly construed for the protection of the public interest" (*supra*, pp. 29-30) the decision below is clearly erroneous.

II

As Construed by the Court Below, the Regulation Would Be Invalid Because It Would Exceed the Authority of the Secretary of the Interior.

A. Congress alone has the power to dispose of federal property. U. S. Const., Art. 4, sec. 3; *United States* v. *San Francisco*, 310 U. S. 16, 29;

[13] At pp. 20-37, we show that respondent had no such contract right as it claims.

Utah Power & Light Co. v. *United States*, 243 U. S. 389, 404. "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe* v. *United States*, 316 U. S. 317, 326.

Under the holding of the court of appeals in this case, the regulation operates to grant to federal coal lessees a negative easement in the form of a restrictive covenant on all other federal coal lands,[14] and to restrict the power of Congress to dispose of the property of the United States. There is nothing in the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U. S. C. 181, *et seq.*, (*infra*, pp. 65-71), which authorizes the Secretary of the Interior to create such an interest in the public domain or which authorizes the Secretary to restrict, by contract or otherwise, the disposition of federal coal lands. Consequently, even if the Secretary had inserted a specific provision in respondent's contract agreeing not to lease other public coal lands unless a need for an additional mine could be shown, it would have been void. A

[14] If respondent has a right which enables it to enforce a restriction upon the use of the lands here involved it would have the same right with respect to other public coal lands anywhere in the United States. Whether respondent could establish any injury flowing from the lease of other lands in all cases and thereby succeed in enjoining the Secretary is immaterial. The question here is whether it has a right which gives it standing to maintain such a suit.

regulation purporting to accomplish the same result would also be invalid. The United States is neither bound nor estopped by the unauthorized acts of its agents in dealing with its property. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 408-409; cf. *United States* v. *San Francisco*, 310 U. S. 16, 31-32.

The court below found authority for the regulation, as construed by it, by reasoning that since the Secretary "had power to withdraw lands from leasing" he "could impose the conditions upon which he would lease." (R. 104). But the power to withdraw lands does not carry with it authority to create property interests in persons benefited by the withdrawal, unless there is an express statutory grant, or an implied Congressional delegation, of the power to do so. *Sioux Tribe* v. *United States*, 316 U. S. 317, 324-331; *Ute Indians* v. *United States*, 330 U. S. 169, 176. Express statutory authorization is admittedly absent, and there is not the slightest foundation for implying such a grant of power from the terms or purposes of the Mineral Leasing Act. *Infra*, pp. 43-45, 65-71; *supra*, pp. 24-27, 41.

Moreover, the discretionary power vested in the Secretary (30 U. S. C. 201, *infra*, pp. 65-66) to determine whether or not a lease should issue was by its nature a continuing authority and duty which the Secretary was not empowered to abdicate. Cf. *Wilbur* v. *United States*, 281 U. S. 206, 216-217.

le could not, under his authority to adopt general egulations to carry out the purposes of the act see Br. in Opp., p. 17), bind his successors by com- itting them to a particular policy in awarding eases. Nor could he in any way restrict or other- ise impair the constitutional power of Congress o dispose of public property.

B. Not only is there nothing in the Mineral Leas- ng Act which would authorize any action by the ecretary having the result given the regulation y the court below, but the whole purport of the ct militates against such an authorization. The umber of acres which may be leased to any one erson, association or corporation is limited. 30 . S. C. 201, 203, 204, 184. The Act also expresses strong policy against the use of public lands in estraint of trade. 30 U. S. C. 184. Moreover, it rovides that each lease shall contain such provi- ons as the Secretary shall deem necessary to in- re the sale of the production of such leased lands t reasonable prices, for the protection of the in- erests of the United States, for the prevention of onopoly and for the safeguarding of the public elfare. 30 U. S. C. 187. Other powers are granted or the purpose of encouraging the greatest ulti- ate recovery of coal. 30 U. S. C. 209.

Thus, a regulation permitting lessees to acquire right to restrict the leasing of other lands would e wholly inconsistent with the terms of the Act. t would be contrary to the Congressional mandate

that no lessee should have an interest in more than 2,560 acres. Despite the declaration of policy in the Act against the use of public lands in restraint of trade and despite the requirement that the Secretary make whatever provisions were deemed necessary to prevent monopoly, it would enable one lessee to force out of business a company whose deposits, like the one at hand, were nearing exhaustion, if it could not show that a competitor was unable to meet all the demand. It would thwart one of the avowed purposes of the Act to encourage the greatest ultimate recovery of coal from federal lands, by requiring the United States to bear the burden of an attempt to cure the ills of the coal industry. In addition, in situations like the present one, where an operator on non-federal lands desires to pursue a vein into contiguous federal lands, it might very well be that the ultimate recovery of the coal on the federal lands would depend upon that particular lease application being granted, even though a need for the coal which could not otherwise be met could not be shown. At a later time when a market need arose, but when the necessary equipment had been removed from the scene or deteriorated, an attempt to develop the remaining coal on the federal lands might be uneconomical—with the result that the federal deposits would be forever wasted.

It is submitted, therefore, that the authority granted the Secretary under the Mineral Leasing

Act does not authorize him to vest in federal coal lessees a negative easement in all other federal coal lands, or in any way to restrict or impair the constitutional power of Congress to control the disposition of public lands. And, if affirmative proof were needed to show that Congress did not intend to grant such authority, it is found in the express provisions of the Act limiting the acreage which may be leased to one person or corporation and declaring a policy to prevent monopoly and the use of federal lands in restraint of trade.[15]

III

The Amended Complaint Is Subject to Dismissal Because It Seeks to Maintain a Suit Against the United States Without the Sovereign's Consent.

When this case was originally dismissed by the district court, it rejected petitioner's claim that the United States was an indispensable party (R. 9, 30). Upon the second appeal, the majority opinion made no mention of this question, although one ground of Judge Edgerton's dissent was that "* * * the United States is a necessary party when suit is brought to prevent the leasing of its lands" (R. 106). His conclusion was, we submit, plainly correct.

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[15] It is our view, of course, that the Secretary of the Interior did not adopt, or intend to adopt, any such invalid regulation in 1934 or thereafter. *Supra*, pp. 20-33. Indeed, the illegality of the regulation, as interpreted by the court of appeals, supplies another reason for reading it as we urge.

A. The property sought to be leased is owned by the United States. The general principle is well established that "a proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota* v. *United States*, 305 U. S. 382, 386; *Belknap* v. *Schild*, 161 U. S. 10, 18, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. It is equally clear that suits for specific enforcement of rights to secure government property, alleged to have arisen from contracts, constitute suits against the United States, and hence may not be prosecuted against a government officer. *Goldberg* v. *Daniels*, 231 U. S. 218; *Louisiana* v. *Garfield*, 211 U. S. 70; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60; *New Mexico* v. *Lane*, 243 U. S. 52; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682.[16] Also, specific performance of governmental contracts cannot be obtained by means of securing an injunction or mandatory relief against governmental agents. *Louisiana* v. *Jumel*, 107 U. S. 711, 720-721; *Hagood* v. *Southern*, 117 U. S. 52, 67-68; *In re Ayers*, 123 U. S. 443, 502-504; *Levey* v. *Stockslager*,

[16] A different situation is presented, of course, where a government officer is under a ministerial duty to dispose of government property in a particular manner and hence relief is available by means of mandamus. *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197, cited by respondent (Br. in Opp. p. 20), is of this nature. See also *Ballinger* v. *Frost*, 216 U. S. 240; *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Lane* v. *Hoglund*, 244 U. S. 174.

129 U. S. 470, 478; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9-10; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Tindal* v. *Wesley*, 167 U. S. 204, 219-220; *Ex parte Young*, 209 U. S. 123, 151-152; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642; *Goldberg* v. *Daniels*, 231 U. S. 218; *Wells* v. *Roper*, 246 U. S. 335, 337-338; *Ex parte New York*, 256 U. S. 490, 500-501; *Goltra* v. *Weeks*, 271 U. S. 536, 546; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371; *Land* v. *Dollar*, 330 U. S. 731, 737; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682; *Transcontinental & Western Air* v. *Farley*, 71 F. 2d 288, 290-291 (C. A. 2), certiorari denied, 293 U. S. 603. Under these interrelated principles, the present case constitutes an attempt to sue the United States without its consent, whether the case be treated as a suit for the "prevention of breach of a restrictive provision in a contract" (R. 105), or as a suit to establish a property interest—in the nature of a negative easement—in the land sought to be leased to Big Horn. If the action be one to enforce respondent's rights under the lease-contract with the United States, it cannot be brought against the Secretary of the Interior; if it be considered a claim to a property interest in other Government-owned coal lands, it is likewise forbidden by established doctrine.

B. 1. Respondent argues (Br. in Opp. p. 19) that a different result follows because its "prayer for relief is purely negative and prohibitory, in substance as well as in form." But the fact that the

relief sought is in terms a negative injunction which does not literally direct performance of the alleged contract makes no difference. "An injunction against the breach of a contract is a negative decree of specific performance of the agreement." *Shubert* v. *Woodward*, 167 Fed. 47, 53 (C. A. 8). Indeed, the contention urged by respondent has long since been rejected by this Court in *In re Ayers*, 123 U. S. 443. In that case, the same distinction was offered (123 U. S. at p. 485), and after stating the principle as to suits to compel affirmative action by government officers, this Court stated (123 U. S. at pp. 502-503):

> The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State.

See also *Wells* v. *Roper*, 246 U. S. 335, and *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, in which the relief sought was also purely negative, but the non-

ction of the officers would amount to performance of a government contract. Obviously, a suit may be no less a suit against the sovereign because it seeks to compel the non-action, rather than action, of the government officer. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69-70; *Morrison* v. *Work*, 266 U. S. 481, 485-488; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 689.

2. The fact that in the instant case the alleged promise of the government is negative, that is, a promise not to lease its land rather than an affirmative promise to lease or sell its property, is likewise immaterial. In logic, whether the sovereign's promise is negative or affirmative, the same limitations upon its enforcement apply, since in either case it is the sovereign's alleged agreement which is basic to the suit. The contract here involved is between respondent and the United States (R. 77-84, 104). Petitioner, not being a party thereto, is "not capable in law of committing a breach of it." *In re Ayers*, 123 U. S. 443, 503. He has no personal interest either in respondent's contract or in the proposed lease, which is alleged to be a threatened breach of respondent's agreement. On the other hand, in the execution of the lease of public lands to Big Horn, he proposed to act merely as an agent of the Government, and, indeed, it is only because of his official authority that respondent's interests are at all endangered by what he proposes to

do. *Wells* v. *Roper*, 246 U. S. 335, 337. Moreover, the relief sought, although nominally a restraint upon petitioner's leasing of public lands, is in reality against his principal, the United States, in that the restraint will be imposed upon the use and disposition of property, title and possession of which is admittedly in the Government. *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601. In essence, therefore, respondent's complaint is that under its lease contract, it has the right to insist that the United States not lease any of its public lands for coal mining purposes unless a need for an additional mine is found, and that the United States acting through petitioner, its agent, should be restrained from entering into coal leases absent the required finding of need. Thus, by the indirect means of enjoining a government officer from performing an act which it is alleged will constitute a breach of contract, respondent seeks specific performance of the contract by the Government. Plainly, as stated above, such a proceeding is in essence the same as a suit seeking specific performance of a contract to sell property to respondent. *Supra*, pp. 46-48.

3. Respondent argues (Br. in Opp. p. 20) that it is not seeking to enforce specifically a government contract but rather is attempting to enjoin unauthorized action which threatens its "property rights." Of course, enforcement of specific performance of a government contract cannot be justified by circularly saying that the rights alleged to

have been secured under the contract are "property rights", and hence that an attempted breach of the contract by a government officer necessarily constitutes an unauthorized interference with such property rights. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 685, 688, 692, 700-1, 703. But that seems to be respondent's argument. The only other meaning that can be given to the argument is that respondent has been granted a property right to be free of competition from other government coal lands. That is simply an assertion of a property interest in the nature of a negative easement in the other lands sought to be leased. But such an asserted property interest cannot be established in the absence of the United States which is admittedly the owner of fee simple title. Cf. *Stanley* v. *Schwalby*, 162 U. S. 255, 272; *Belknap* v. *Schild*, 161 U. S. 10. And in such a case it is immaterial whether or not it is alleged that the government official is acting in excess of or without statutory authority, in refusing to recognize the assumed private interests in the government lands. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 691; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, 374-375; *Morrison* v. *Work*, 266 U. S. 481, 485-488; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475-476. Here, as in the *Larson* case, it is clear that, apart from the disputed regulation, petitioner

had statutory authority to issue the lease to Big Horn. The result is more obvious here, however, because respondent's contention is not, as in the *Larson* case, that it has full ownership of the property but simply that, as a result of the Secretary's action in promulgating the regulation and issuing a lease to it, it now has a right to control the leasing of admittedly federal property. Even assuming that the present Secretary would exceed his authority if the lease to Big Horn were consummated, respondent's claim must fail, as one against the sovereign, because it necessarily involves the "disposition of unquestionably sovereign property" (*Larson*, 337 U. S., at 691), and would interfere with the Government's management and disposition of public lands by enjoining its officials (*Morrison* v. *Work*, *supra*, at 485).

Cases such as *United States* v. *Lee*, 106 U. S. 196; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197; *Frost* v. *Corporation Commission*, 278 U. S. 515; and *Land* v. *Dollar*, 330 U. S. 731, relied upon by respondent (Br. in Opp. p. 20), are clearly distinguishable. In none of them was the officer dealing with property in which the sovereign had any substantial interest, but was, at least on the basis of the plaintiff's allegations, guilty of interfering with property of a private individual.[17] Unless the officer could es-

[17] In fact, the *Frost* case is wholly immaterial here, since the question of sovereign immunity was not involved, but only standing to sue. The question of whether the plaintiff

tablish a valid authority for his action, he was acting as a mere individual, and could be enjoined as any individual acting tortiously. Thus, in the *Lee* case, a suit in ejectment against Government officers, plaintiff claimed title, while the officers defended by alleging title in the United States by virtue of a tax sale. At the trial, the jury found that the United States had acquired no title under the tax sale proceedings and the Government's lack of title was assumed in this Court (106 U. S. at p. 204). Only on that assumption was there any materiality in the question of the officers' authority (106 U. S. at pp. 219-220). See *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 696-697. And in the *Stimson* case, a suit against the Secretary of War to set aside harbor lines encroaching on plaintiff's land, plaintiff's title was conceded, so that there was no question as to whether the Secretary was dealing with Government property, but only as to whether his act was duly authorized (223 U. S. at pp. 619-620, 622-623). Likewise, in the *Fall* case, a suit to enjoin the Secretary of the Interior from canceling selections of public lands, it was held that title had vested in the plaintiff immediately upon selection, with the result that the United States held only a bare legal title and that

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has shown sufficient property interest to give him standing to sue is, of course, entirely separate from the question of sovereign immunity from suit. Cf. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 693. Public property was in no way affected by the suit in the *Frost* case.

the Secretary had no authority to cancel, but only a ministerial duty to issue the patent. And in the *Land* case, plaintiffs claimed title to shares of stock alleged to be wrongfully withheld by officials, who asserted title to be in the Government. The defense depended upon authority to acquire the stock and also an interpretation of the contract under which the officials had obtained possession (330 U. S. at pp. 735-736). It was merely held that the district court had "jurisdiction to determine its jurisdiction" by determining the question of title (330 U. S. at p. 739).[18]

In contrast, in the present case the title and right of possession of the United States in the lands proposed to be leased are not questioned. Thus, acceptance of respondent's argument would result not in the conclusion that petitioner is a trespasser, as in the *Lee* case, but simply in a limitation upon his power, as a government official, to lease the land. Such restraint would expend itself, not upon petitioner or his property, but upon the lands and treasury of the United States.[19] Indeed, by virtue of the temporary restraint issued in this case, public lands have been forced to lie idle for

[18] The question of title was subsequently determined in favor of the Government. *Dollar* v. *Land*, 82 F. Supp. 919 (D. D. C.), now on appeal to the Court of Appeals for the District of Columbia Circuit.

[19] Cf. *Land* v. *Dollar*, 330 U. S. 731, 738; *Williams* v. *Fanning*, 332 U. S. 490, 493; *Larson* v. *Domestic and Foreign Corp.*, 337 U. S. 682, 688, 691.

the two years since the complaint was filed, when they could have been developed and put to use and the benefits derived therefrom in royalties deposited in the Treasury. Clearer proof that the suit is, in fact, against the United States and not merely against an officer can hardly be imagined.

IV

In Any Event, the Court Below Erred in Ordering that the Temporary Restraint Imposed by the District Court Be Continued in Effect Until Final Disposition of the Action by the District Court.

A. Ever since the filing of the original complaint on November 4, 1947, petitioner has been restrained from issuing the proposed leases.[20] Upon remand

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[20] The following is a summary of the various restraining orders entered in the case:

(1) November 4, 1947—*ex parte* order entered by district court, enjoining leasing for a period of ten days (R. 89, 108).

(2) November 14, 1947—after hearing on motion for preliminary injunction and motion to dismiss complaint, district court continued temporary restraint to November 18, 1947 (R. 89, 108).

(3) November 17, 1947—district court continued temporary restraint to November 21, 1947, and at the same time denied motion for preliminary injunction and oral application for preliminary injunction pending appeal from dismissal of complaint (R. 18, 108).

(4) November 21, 1947—court of appeals continued restraining order pending disposition of respondent's motion for temporary injunction pending appeal (R. 89).

(5) December 4, 1947—court of appeals issued a temporary injunction pending appeal (R. 89-90, 108).

(6) April 23, 1948—court of appeals, in affirming dismissal of complaint, continued its temporary injunction until ten days after mandate was filed in district court (R. 36).

after the first appeal the district court on June 4, 1948, entered a temporary restraint (R. 108-109), upon consent of petitioner (R. 87), which enjoined the issuance of the proposed leases until the disposition of respondent's motion for leave to file the amended complaint, and, if said motion should be granted, until disposition of respondent's motion for preliminary injunction (R. 108-109). On July 6, 1948, the district court overruled respondent's motion for leave to amend and denied its motion for preliminary injunction, but at the same time extended the restraint for ten days to permit appeal (R. 87). Over petitioner's objection, the court below continued the restraint pending final disposition of the appeal (R. 92), and, in reversing the order denying respondent's motion for leave to amend, ordered that the order issued by the district court on June 4, 1948, "will be continued in

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(7) June 4, 1948—on consent of parties, district court issued its order restraining leasing until the further order of the court upon the disposition of respondent's motion for leave to file an amended complaint (R. 108-109).

(8) July 6, 1948—when overruling motion for leave to file an amended complaint and denying motion for preliminary injunction, district court continued restraint for ten days to permit appeal (R. 87).

(9) July 16, 1948—court of appeals continued restraint in effect pending final disposition of the appeal or further order of the court (R. 92).

(10) January 31, 1949—court of appeals, in reversing denial of motion for leave to amend, continued restraint in effect until final disposition of the action by the district court (R. 106).

effect until final disposition of the action by that court" (R. 106).[21] In essence, therefore, the court below has directed the district court to convert its temporary restraining order into a preliminary injunction *pendente lite*.[22] *Sims* v. *Greene*, 160 F. 2d 512, 517 (C.A. 3); *Davis* v. *Hayden*, 238 Fed. 734, 737 (C.A. 4); cf. *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188.

Respondent asserts (Br. in Opp. pp. 21-22) that the court below has continued the temporary restraining order only until action by the district court in allowing the filing of the amended com-

[21] It is not clear whether the court below intended merely to direct the district court to extend the restraint, or whether it intended to adopt the district court's restraint as its own and to extend it as its own process. However, it is assumed for the purposes of the argument made herein that this part of the judgment is a direction to the district court. This assumption obviates the anomalous situation of having the court of appeals retain jurisdiction over the injunction, while the rest of the case finds its way through the district court, and removes any question as to the jurisdiction of the court of appeals to issue such an injunction as its own process. *In re Philadelphia & Reading Coal & Iron Co.*, 103 F. 2d 901, 903 (C. A. 3); cf. *De Beers Mines* v. *United States*, 325 U. S. 212, 217; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25-26. In any event, the injunction would be subject to the same attack (see *infra*, pp. 59-63) if it were in fact intended as the distinct process of the court of appeals.

[22] Both the District Court (R. 87) and the court of appeals (R. 106) used the term "temporary injunction" instead of "temporary restraining order", but it is quite plain that the restraint issued was not a preliminary injunction, as envisaged by Rule 65 of the Federal Rules of Civil Procedure, but in the nature of a temporary restraining order. Cf. R. 108-109.

plaint and denying the motion to dismiss, as directed by the court below. In view of the settled meaning of the phrase "final disposition of the action," respondent's argument in this respect is obviously without any basis. Moreover, even under respondent's interpretation, it should be pointed out that the temporary restraining order has been improperly transformed into a preliminary injunction. Under Rule 65(b) of the Federal Rules of Civil Procedure, a temporary restraining order may not be continued beyond twenty days without consent, and the order ceases to be a temporary restraining order when continued, without consent, for any substantial length of time beyond the prescribed period. *Sims* v. *Greene*, 160 F. 2d 512, 516-517 (C.A. 3). Thus, here, where the temporary restraining order was first entered on June 4, 1948 (R. 108-109), and continued for a further period of ten days by the district court without petitioner's consent (R. 87), the further indefinite continuation directed by the court of appeals has transformed the order into a preliminary injunction, issued without hearing or findings. This, in itself, would be error.[23]

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[23] In arguing to the contrary, respondent asserts (Br. in Opp., p. 22) that upon the district court's granting leave to amend the complaint, the continuance of the injunction by the court of appeals would automatically expire and that the terms of the district court order of June 4, 1948 (i. e., "in the event the motion for leave is granted then the motion for preliminary injunction shall be further heard within ten

B. Even though it be assumed, for the moment, that the court below, in aid of its appellate jurisdiction, had the power to direct the district court to enjoin leasing until the final disposition of the action, this is not an appropriate case for the exercise of that power. There is no indication that the district court is seeking to obstruct the appellate jurisdiction of the court below, and respondent has a right of appeal from any order refusing an injunction. 28 U.S.C. 1292(1); cf. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25-26. These difficulties could, of course, have been avoided if the court below, as it did on the first appeal, had simply entered its own temporary injunction pending appeal and for a reasonable time after its mandate issued.

Moreover, it is plain that under the circumstances here present the court below had no jurisdiction, even in aid of its appellate jurisdiction, to do what it has done, since its action is not "agreeable to the usages and principles of law." 28 U.S.C. 1651. Due process and Rules 52(a) and 65(a) of the Federal Rules of Civil Procedure re-

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days thereafter") would automatically give an additional ten days for further hearing on the question of a preliminary injunction. One fallacy in this interpretation of the judgment of the court below is that there is now no motion for a preliminary injunction pending in the district court. Respondent's motion for such injunction was denied on July 6, 1948 (R. 87). Hence, the part of the order of June 4, 1948, relied upon by petitioner, has been inoperative for more than a year.

quire that, absent consent of the party sought to be enjoined, an injunction *pendente lite* be issued only after a full hearing, and that the injunction order be supported by findings of fact and conclusions of law. *Mayo* v. *Canning Co.*, 309 U.S. 310, 316-317; *Public Serv. Comm'n* v. *Wisconsin Tel. Co.*, 289 U.S. 67; *Sims* v. *Greene*, 161 F. 2d 87 (C.A. 3); *Bank of Madison* v. *Graber*, 158 F. 2d 137, 141-142 (C.A. 7); *Shannon* v. *Retail Clerks, International P. Ass'n*, 128 F. 2d 553, 555 (C.A. 7). There was no hearing on the matter in the district court, and in the court of appeals petitioner opposed the granting of an injunction pending appeal. The court of appeals neither made findings which would reveal the grounds for its action, nor purported to be correcting findings made by the district court.[24] Thus, the court below is directing the district court to do what the district court is forbidden to do, i.e., issue a preliminary injunction without hearing and without findings. Obviously, the "all writs" statute (28 U.S.C. 1651) confers no such power.

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[24] In denying the motion for preliminary injunction filed with the amended complaint (R. 87), the district court made no findings. However, findings were not necessary, since, when the motion for leave to amend was denied, the motion for preliminary injunction became moot, there being no complaint before the court. In *denying* the motion for preliminary injunction filed with the original complaint, the district court had made findings and conclusions (R. 28-30). The court below could not and did not purport to be reviewing these findings, which obviously could not support the issuance of an injunction *pendente lite*.

These objections to the action of the court of appeals in ordering the issuance of a preliminary injunction without a hearing or findings are not purely technical, but go to the very roots of proper and fair procedure. Just as in the case of any equitable relief, respondent has no right to the granting of a preliminary injunction, but such relief may be granted or withheld in the sound discretion of the trial court. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *Deckert* v. *Independence Corp.*, 311 U.S. 282, 290. Exercise of such discretion requires consideration of such factors as the validity of defenses, the relative damages to be sustained if the injunction is granted or refused, the difficulty of ascertaining damages, and many similar matters, and only by affording a full hearing to all parties may the court properly exercise this discretion.[25] Thus, without a hearing be-

[25] To elaborate on only one of the factors to be considered, it may be pointed out that respondent acknowledges that either it or the proposed lessee will be damaged by the ultimate decision in this case (R. 22, 27). It is clear that the proposed lessee is also suffering damage due to the temporary restraint, and there is, to say the least, a question of fact as to the seriousness of the damage it is suffering because of its inability to begin operations on the public lands (R. 27, 31), as compared to the damage respondent might suffer by issuance of the lease. The United States is also losing rentals during the period of restrajnt. Upon all the facts, it might well be found to be more equitable to remove all restraint, and leave respondent to its remedy at law, or to impose conditions upon equitable relief which would protect the interests of both the parties and Big Horn Coal Com-

ing held, there could not have been any exercise of the sound discretion to which petitioner is entitled. And absent findings, this Court is left to speculate as to what facts, if any, exist to support the preliminary injunction, so that any right of review would be nugatory. Plainly, the court below has acted beyond its powers, and at the very least its judgment should be modified to leave with the district court discretion to determine, after hearing, whether or not an injunction *pendente lite* should issue.

Finally, the direction of the court of appeals ties the hands of the district court throughout the course of the litigation. It leaves the district court without discretion or power to modify or to dissolve the injunction *pendente lite* regardless of how circumstances may change with the passage of time. It would also seem to leave petitioner without any possibility of relief if circumstances should change. The district court would be required by the present decision to deny any application for modification or dissolution, and any appeal from its action would probably be fruitless since the court of appeals could hardly reverse for

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pany and its employees who could enjoy the employment advantages of expanded operations. Where "large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution . . ." *Hurley v. Kincaid*, 285 U. S. 95, 104; cf. *Harrisonville v. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338.

obedience of its own command. The court of appeals would seem to lack power to alter its present judgment either by modification or dissolution, since the term at which it was entered has expired. Hence, it is submitted that the extension of the interlocutory injunction until final disposition of the action constitutes such a clear abuse of discretion as to warrant invocation of this Court's supervisory power. Cf. *Landis* v. *North American Co.*, 299 U.S. 248, 257.[26]

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[26] Respondent suggests (Br. in Opp. pp. 22-23) that, rather than seeking review in this Court, petitioner should have first sought relief as to the terms of the injunction in the court of appeals. Since this point is only of secondary importance in the disposition of this case and need be considered by this Court only if the other points advanced by petitioner are rejected, the seeking of such relief in the court below would have served merely to delay still further the final disposition of the case. As the court of appeals itself recognized more than nine months ago, "This litigation has already consumed a long time" (R. 99), more than two years at the present time, during which time the management of the public lands has been subject to judicial restraint. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130-131. *Supra*, pp. 55-56.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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DECEMBER, 1949.

APPENDIX

Relevant portions of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*, in effect at the time of the departmental decisions herein, are as follows:

> Sec. 1 [30 U.S.C. 181]. * * * deposits of coal * * * and lands containing such deposits owned by the United States * * *, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act * * *.
>
> Sec. 2 [30 U.S.C. 201]. * * * the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: * * * where prospecting or exploratory work is necessary to determine the exis-

tence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit: * * * no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated * * *.

Sec. 3 [30 U.S.C. 203]. * * * any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

Sec. 4 [30 U.S.C. 204]. * * * upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its

lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.

Sec. 7 [30 U.S.C. 207]. * * * for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuation of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. * * * the Secretary of the Interior may permit suspen-

sion of operation under such lease for not to exceed six months at any one time when market conditions are such that the lease can not be operated except at a loss.

Sec. 27 [30 U.S.C. 184]. No person, association, or corporation, except as herein provided, shall take or hold coal * * * leases or permits during the life of such leases in any one State, exceeding in the aggregate acreage two thousand five hundred and sixty acres * * *. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. * * * Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly or in any manner whatso-

ever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal * * * entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings.

Sec. 29 [30 U.S.C. 186]. * * * any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes. * * *

Sec. 30 [30 U.S.C. 187]. * * * The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make

written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain * * * such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare * * *.

Sec. 32 [30 U.S.C. 189]. * * * the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *.

Sec. 37 [30 U.S.C. 193]. * * * the deposits of coal * * * herein referred to, in lands valuable for such minerals * * * shall be subject to disposition only in the form and manner provided in this Act * * *.

Sec. 39 [30 U.S.C. 209]. The Secretary of the Interior for the purpose of encouraging the greatest ultimate recovery of coal, oil, or gas and in the interest of conservation of natural resources is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for

royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

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No. 60

IN THE

Supreme Court of the United States

JULIUS A. KRUG, *Petitioner*,

v.

SHERIDAN-WYOMING COAL COMPANY, INC., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

RESPONDENT'S MOTION THAT CERTIORARI BE GRANTED TO CORRECT DIMINUTION OF THE RECORD.

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RESPONDENT'S MOTION THAT CERTIORARI BE GRANTED TO CORRECT DIMINUTION OF THE RECORD.

Comes now the respondent herein, Sheridan-Wyoming Coal Co., Inc., and respectfully moves that certiorari be granted to correct diminution of the printed record filed by the petitioner, herein, consisting of the absence therefrom of the following items:

(a) The omission of graph Exhibit K to the amended complaint (R. 84), and

(b) A certain brief *amicus curiae* filed below together with a motion for leave to file it by the Big Horn Coal Company (R. 95).

A. The graph Exhibit K was designated by the petitioner as disclosed by the index to the printed record. Its omission (R. 84) presumably was due to a printer's inadvertence. It is most essential to the respondent for the purpose of demonstrating the inevitable economic chaos which will be visited upon a vast segment of the Far Western coal industry if the petitioner succeeds in upholding his claimed right to violate a statutory regulation now incorporated into the coal leasing laws of the United States and respondent's lease thereunder.

B. The brief *amicus curiae* was not designated by the petitioner over the objection of respondent, although the motion for leave to file it in the Court of Appeals below was included (R. 95).

The Clerk's office of this court did not consider that said brief was a part of the record below but drew attention to the fact that respondent could certify up a copy and thereupon base any references to be made thereto.

Respondent is uncertain as to whether or not this latter course would be the equivalent of including said brief in the record of this case in this court, and is also uncertain as to whether or not it would be necessary that certification be the equivalent of including it in the record.

In view of these factors and in view of its belief that said brief is actually a part of the record below, the respondent adopts this as the only means of receiving clarification of these questions before filing its brief.

C. The reasons as to why respondent believes the Big Horn brief to be a part of the record and its importance in the cause are as follows:

The Big Horn Coal Company was the applicant before the Interior Department for a coal mining lease to valuable public coal lands controlled by the laws of the United States under which the petitioner has lawful leasing powers only so long as he acts within his statutory authority as Secretary of the Interior. Inasmuch as the respondent has a coal mining lease under the statutes of the United States on other adjacent public lands and would sustain grave

and irreparable injury thereto if the defendant were allowed to ignore or violate the laws controlling him; and inasmuch as such laws were written into respondent's coal mining lease, it was necessary for the respondent to bring this action to enjoin the defendant personally from acting in violation of the laws of the United States which the granting of a lease to the Big Horn Coal Company would result in.

In its complaint respondent has pleaded violations of the law already committed by the defendant and the intentional participation of the Big Horn Coal Company. In the brief *amicus curiae* the Big Horn Coal Company confirmed its intentional wrong-doing and made certain very damaging admissions with respect to the lawless nature and character of their whole lease application and the proceeding thereon when it was before the Interior Department.

Respondent believes that this Court is entitled to the benefit of considering the admissions which Big Horn made in its brief *amicus curiae* below in order that this Court may know that the whole nature and character of a departmental proceeding was one of controlling persuasion by the Big Horn Coal Company, whereby it induced the defendant to violate and ignore the law which controlled his leasing authority.

All motions are a part of the record; and the motion covering the brief *amicus curiae* was so treated (R. 95). It is respondent's view that any attachment to such motion thereby becomes incorporated in the motion and is an integral part of it.

Indeed the Court of Appeals in passing upon the motion for leave would have to have before it the very brief which was submitted in order to dispose of the motion inasmuch as the motion for leave plainly referred to that brief specifically and was plainly connected thereto.

It is also clear that the Court of Appeals took Big Horn's brief *amicus curiae* as confirming admissions from Big

Horn, of the allegations of Sheridan-Wyoming's complaint. That Court in its opinion which is now here for review, said:

> "The 'good faith' of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized, and according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed venture. *It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.*" (Italics supplied)

The italicized matter represents a specific reference to and reliance upon admissions in the Big Horn brief.

It would indeed be singular if this Court could not have before it the same record which the Court of Appeals had in arriving at its opinion which is here for review.

This attitude which Big Horn demonstrated in their brief *amicus curiae* and in the departmental proceedings below is the very factor which raised such a storm of protest to the Department of Interior by the entire western coal industry. At that time the United Mine Workers of America, Montana Coal Operators Association, Coal Producers Association of Washington, Southern Wyoming Coal Operators Association, Utah Coal Operators Association, Rocky Mountain Coal Mining Institute, and New Mexico Coal Operators Association, violently protested the actions of the Big Horn Coal Company. These associations represent many thousands of employees and many hundreds of investors dependent upon the enforcement of the coal leasing laws of the United States for their very livelihood. It is submitted that in a question of this importance to so many thousands of people, this Court should be as fully advised as possible as to the fundamental basis and controlling reason that the defendant was persuaded to ignore and violate the laws of the United States.

WHEREFORE RESPONDENT PRAYS that this motion for certiorari to correct the diminution of the record be allowed, in order that this Court may have a full record before it, and that respondent in preparing its brief may do so upon the basis of a full and complete record.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 60

OSCAR L. CHAPMAN,* *Petitioner*, c/o Department of Interior Building,

v.

SHERIDAN-WYOMING COAL COMPANY, INC., *Respondent*, Sheridan, Wyoming.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

RESPONDENT'S REPLY BRIEF.

QUESTIONS PRESENTED.

(1) Whether Part 43, FCR 193.3, (R. 70) is binding regulatory law of the same full force and effect of the statute under which it was duly promulgated, or whether it is a complete nullity.

2. Whether the petitioner, who admittedly is authorized to lease the public lands only under the terms of the mineral

* Substituted on his own motion for the former petitioner, Julius A. Krug.

leasing statute and general regulations issued thereunder, can exceed such authority and disregard and violate such law.

3. Whether the official fact of authorized promulgation and required publication of a general regulation has any effect in law.

4. Whether a long-standing and completely uniform construction given to said regulation by petitioner may be ignored at his personal whim.

5. Whether the respondent, having the status of a member of a highly regulated class, federal coal lessee, restricted specially against anarchic over-competition has standing to challenge petitioner's violation of one of the governing regulations designed to prevent this anarchy, and where violation would irreparably damage and impair respondent's entire business.

6. Whether the regulation as relevant law was incorporated into respondent's own federal lease; either by operation of law; or by operation of the specific term of the lease which incorporated the Mineral Leasing Act, of which the regulation had become a part.

7. Whether petitioner can, without repeal, arbitrarily ignore the requirements of a historic general leasing regulation uniformly construed as designed to conserve the public lands for all the people and protect the public interest and the public lands coal industry from chaotic over-competition, for the avowed purpose of granting special privilege and exemption from the law in this one instance only.

8. Whether the United States is a necessary party where only the petitioner has been sued personally to prevent him from exceeding his lawful authority and violating his statutory duty under the very statute conferring his sole authority; where the respondent has claimed no title or

interest in property of the United States; where the United States claims no title or interest in the leasehold property conveyed to respondent; where the United States would be required to do nothing whatever by the relief requested; where the lands of the United States would remain freely disposable in accordance with its laws, after the relief had been granted.

9. Whether petitioner, without requesting relief of the appellate federal court may challenge here its action to protect its mandate to a trial court by ordering a continuance of the trial court's temporary restraint; which restraint, by its own terms, is of only interim duration, for the sole purpose of disposing of the same matter covered by the mandate; especially where the trial court has ignored and refused to recognize a prior substantive ruling of the appellate court, requiring the mandate.

STATEMENT OF THE CASE.

A. THE FACTS.

1. The Situation of Sheridan-Wyoming Coal Company.

Respondent, Sheridan-Wyoming Coal Company, a long-time operator of Federal Coal leases, at this moment stands at the brink of economic disaster and eventual bankruptcy. (Amended Complaint, Sixteenth, R. 56).

Respondent, Sheridan-Wyoming Coal Company, leases certain Federal coal lands in and around Monarch and Sheridan, Wyoming.[1] It operates the Monarch mine upon such land which was leased in 1943. Previously it held Federal coal leases and operated coal mines in this same area long before 1934. Sheridan has modern installed capacity sufficient to supply market demands for this coal, in the area it can serve, twice over.

Some sixteen years ago the government of the United States instituted a general policy of preventing the crea-

[1] Text of lease appears in Amended Complaint, Exhibit J, R. 77.

tion of unneeded over-competition in the chronically sick coal industry of the public lands states.[1] It therefore duly published Regulation 193.3, (Amended Complaint, First (b) R. 51), a statutory Regulation authorized by the Mineral Leasing Act, the purpose and effect of which was to prevent, by sound economic planning, the creation of unneeded new coal mines on Federal coal lands. Thus, in times of prosperity the people would not be led into the creation of new enterprises in a normally sick and overcrowded industry.

For fourteen years the uniform departmental construction required a finding of market need. For the first time, petitioner threatens here to make an isolated arbitrary and discriminatory "exception" and lease Federal coal land to the Big Horn Coal Company *without any market need or any finding of market need as required by this law.*

The petitioner has long and profitably leased Federal coal lands to respondent. (Amended Complaint First (d) and (e), R. 51, 52). Respondent has expended millions of dollars in reliance on the restrictive Regulation as an inducement (Amended Complaint, First (e) and (f)) and bargained for the restriction (*Id.* (g)). (R. 52). Yet petitioner now proposed to create new Federal competition for respondent by granting certain leases to a newly established and adjoining "war-baby" state mine, the Big Horn Coal Company. This he is determined to do in the teeth of the Regulation requiring a showing and finding of consumer need, although he found none;[2] this he would do while expressly reaffirming the regulation and its wisdom;[3] and despite the withdrawal of the lands.[4]

The export coal industry until recently enjoyed a post-war boom. But the Monarch area coal industry, due to its low-grade, non-exportable, substandard, non-storable coal,

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[1] See withdrawal letters of Secretary Ickes, R. 57, 58.

[2] Amended Complaint, Tenth through Twelfth, R. 54, 55.

[3] R. 62, 69.

[4] Amended Complaint, Fourteenth. R. 55.

at the war's end immediately suffered a return to its long term drastic consumption downtrend which had been relieved in forty years only by the two war booms. (See Graph, Exhibit K, Amended Complaint). (R. 84). It finds a limited market under the protection of freight rates for more distant superior coals, but constantly shrinking under the impact of oil.

Respondent has paid royalties on over 1,300,000 tons of coal to petitioner. (Amended Complaint, First (e), R. 50).

2. Big Horn's Activities.

In late 1943, the Big Horn Coal Company, a subsidiary of the gigantic road building contract Peter Kiewit & Sons[5] of Denver, Colorado, somehow prevailed upon the State of Wyoming, with whom Kiewit had many road building contracts, to allow them to establish a new mine in this immediate area, by leasing State lands despite the disastrous history of coal mining in the area. (R. 15). Some few months later, in early 1944, the Big Horn Coal Company started producing this substandard type of Sheridan area coal in direct competition with appellant. The disastrous effect of this large and growing over-competition, in a declining market for this coal, is apparent from the Graph, Exhibit K.[6] It has reduced Sheridan's production to less than half its 1,200,000-ton annual capacity, and threatens serious price wars, loss operations and eventual bankruptcy for both companies.

When the Big Horn Coal Company established its new mine on State lands it had *already* applied for a Federal lease. Big Horn swore this Federal lease was economically necessary to justify the investment required for the estab-

[5] Its size may best be judged from the fact that it has had backlogs of contracts running in the neighborhood of 70 to 80 million dollars. (Affidavit of D. H. Pape, R. 46.)

[6] The figures represented graphically here were taken from official sources of the U. S. Department of the Interior; Graph K should appear at R. 84, and is incorporated in both the Original and Amended Complaints.

lishment of its new state mine. (Amended Complaint, Fifth (c), R. 51). The Big Horn Company was, of course, on notice of the long-published and established rule of Regulation 193.3 in force since 1934, in reliance upon which respondent has been induced to do business with petitioner. (Amended Complaint, First, R. 51, 52).

Ordinarily it would be difficult to see how they could risk the immediate large investment necessary to opening a mine in the teeth of the law and the regulation. But, even at that early stage, their confidence was such that they went ahead and made their investment, notwithstanding the faint prospect of getting the Federal leases, in the face of a uniform rule to the contrary. At that point they were able to predict with perfect safety and uncanny accuracy that somehow petitioner would several years later want to grant their leases *despite* the regulation. Respondent cannot understand Big Horn's extraordinary confidence in foretelling that they would succeed in having this universal law violated or excepted as by petition for them alone, when all others before them has failed.

The type of argument which Big Horn employed most persuasively before the petitioner can best be gathered from the official transcript of the departmental hearing before him. Respondent at trial will prove from the official transcript that Big Horn's chief counsel admitted that the "technical *legal* situation" forbade issuance. He said:

> "So the policy of the law, as reflected by the Act of Congress is that where there is an existing coal mining operation on leases and the deposit of coal will be exhausted within three years, the Secretary of the Interior may, and I say it is the policy of the Act to, give that lessee additional land so that he may continue his operations and not be put out of business. Now, it will be argued that that presupposes a *Federal* lease and that that is not strictly applicable. I *grant* that from a technical *legal* situation, but here is an existing operation on a coal lease leased from the State." (Italics supplied).

Although it is almost unbelievable that an eminent member of the profession should advance such patently erroneous argument with any degree of confidence, in the very teeth of the language and uniform history of Regulation 193.3, he not only did, but was most persuasive with it; as is indisputably shown by the three departmental decisions (R. 59, 62, 66).

Their application, in the teeth of the valued regulation, aroused an industry-wide storm of protest. Respondent protested before the Department even before[7] its publication; other protestants were the Southern Wyoming Coal Operators Association, the United Mine Workers, the Montana Coal Operators' Association, Coal Producers' Association of Washington, Utah Coal Operators' Association, Colorado and New Mexico Coal Operators' Association, etc. (R. 61).

By odd coincidence the effect of Big Horn's slow and dilatory departmental tactics[7] while hastily proceeding with opening and pushing their State mine, was to create the spurious appearance of "going concern values", hardship and equities when the Federal lease was finally considered. Thus, the small state lease was to be used as a springboard to the vast Federal reserves. They would thus "hoist themselves by their bootstraps" as the Court of Appeals said. And they succeeded before the petitioner.

3. Proceedings in the Department.

None of the three administrative decisions in the instant case make a finding of market need as the law requires[8]

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[7] Big Horn had delayed publications of this application from 1943 to 1945 by requesting a special 8¢ royalty rate (2¢ below the usual Federal rate).

[8] Amended Complaint, Tenth (c), Eleventh and Twelfth, R. 54, 55.

nor do they even make a finding of an "old"[9] mine which the then Undersecretary erroneously urged might remove the need requirement. (Amended Complaint, Tenth through Twelfth, R. 54, 55).

The italicized portions[10] of the first administrative decision (dated April 10, 1947) are an excellent example of the arbitrary and capricious tenor of the departmental decisions herein.

Typical is the statement: "This office will not countenance any deliberate attempts to circumvent the . . . regulation" (R. 59) when it then proceeds to do that very thing. The argument runs that respondent had the burden of proving "bad faith" in this respect on the part of Big Horn. None of the prior decisions construing the Regulation suggest so illogical and unfair a rule.[11] Big Horn applied for a Federal lease before starting their state mine. (Amended Complaint, R. 53). They obviously and frankly wanted the prohibitory regulation either ignored or overruled, as the Court of Appeals emphasized.[12] They knew they could not meet the regulation's sole criterion—consumer need—in view of respondent's uniformly below-capacity operations. First, they swore their state reserves were inadequate to justify their planned investment before making it;[13] then they rushed ahead with development which they rely upon as creating "going concern" equities. *Thus, they adopted a course of action effective only to circumvent the Regulation, whatever their mental state.*

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[9] The first decision made gestures in that direction of a vague and implicatory character; later decisions definitely found "new mine". Actually *all* previous applications were screened against the need criterion (Amended Complaint, Paragraph First (c) and (g), R. 49).

[10] R. 59-61.

[11] See the *Olson* and *Cox* decisions, Amended Comp. R. 5161, incl., which are representative of the established construction (Am. Comp. First (c) R. 49).

[12] R. 103; insert 2 as footnote.

[13] Amended Compl. Fifth (R. 53).

The next paragraph of the department's first opinion (R. 60) urges that "Reg. 193.3 does not apply to cases where Federal lessees seek additional land", citing 43 C. R. F. 193.15. The fallacy of this is patent and two fold. First, that regulation rests upon express authorization by Congress, in 30 U. S. C. § 203, for granting additional land to *Federal* lessees upon exhaustion of reserves. Second, Regulation 193.15 itself states that its modifications of Federal leases are "to be made under similar procedure and *on the same conditions* as original leases." (Italics supplied). Thus the statement quoted is disproved by its own citation. Even existing federal lessees are required to prove consumer need on a renewal application.[14] In any event, any rights conferred by § 203 cannot go beyond Congressional intent, which was limited to Federal lessees.

Thus, petitioner's effort begins to evade and disregard the universal criterion of Regulation 193.3—need—by suggesting a novel exception for all "going mines", or "existing mines". But in practice, in every single case since 1934 the challenge has been to prove consumer need for the lease.[15] Only this can serve the basic purpose of the Regulation-preventing recurrence of anarchic over-production.[16] In this case, for the first time, the suggestion is made that the larger and more devastating the new competition on a non-Federal foothold—"existing large mine"—the better the reason for abandoning protection of established Federal lessees. In other words, the larger the violation of Regulation 193.3, the better the justification.

This decision then, oddly, urges two excellent reasons for denying Big Horn a lease (because they show there is no

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[14] Naturally, Federal lessees have something analogous to "grandfather" rights; they have made an investment after meeting the criterion.

[15] Amended Complaint, Paragraph First (c) R. 51.

[16] See *Cox* and *Olson* cases, R. 71-77, admitted by petitioner to be typical.

market need)—(a) there is lots of other competition from distant coals; (b) the coal is poor.[17]

> "The usual criteria to determine the need for a new mine under Regulation 193.3 do not apply." (R. 66).

because Big Horn was a "going concern". (No such exception can be found in the Regulation, its history, policy or application.) Another pretext for refusal to apply 193.3 follows:

> "(the) evidence fails to disclose that its operation (Big Horn's) has jeopardized the continuance of the competing Sheridan-Wyoming mine"[18]

Again, this quotation admits no market need, by pointed failure to make the finding of consumer need for a Federal lease for the Big Horn Coal Company, while discussing the economics of the Monarch coal area.

The second decision by then Undersecretary Chapman (dated July 29, 1947) (R. 62-66) while affirming the first decision, clarified the supposed "old mine" issue in the following language:

> "*In essence, a new mine was created.*" (Italics supplied; R. 64).

This decision concluded:

> ". . . to grant a lease to Big Horn leaves open the *possibility* of continued existence of both the applicant and its present competitors". (Italics supplied; R. 66).

Thus, although there was an admission Big Horn was a new mine, the requisite finding of need was again skirted

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[17] "(2) and (3)" R. 60.

[18] The uncontroverted evidence does show Big Horn has reached a production equal to Sheridan-Wyoming 1943 sales and taken a lion's share of the present market for this substandard coal, leaving Sheridan operating at less than half proven capacity. (Graph, Exhibit K, R. 84.)

and omitted, and a finding of *possibility* of continued existence was substituted. This palpable error of law appears as a part of a continued search for plausible pretexts to reach a predetermined result.

The third decision (dated October 22, 1947) (R. 66-70) expressly refuses to decide the question of future consumer need which is inevitably the basis of the "showing of need" requirement

> ". . . the prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence." (R. 68).

Yet obviously, some prognosis must be the basis of any finding of consumer need.

Next comes the remarkable fallacy that a company buying new mining equipment of the latest type makes no investment unless it borrows money. If it uses its own cash or its current profits, says the petitioner, no investment is made. Thus, the decision says Sheridan can have made little investment since it last borrowed money (prior to 1934) (R. 68, 69) in the teeth of a sworn and detailed showing of an intensive modernization and capital improvement program.

Accent on the substantial size of Big Horn is the closing keynote of this decision. Thus, the very thing which makes Big Horn's violation of the Regulation the more menacing is used as the pretext for exemption. So, notwithstanding this parcel of fallacies, pretexts, and non-sequiturs, Big Horn is granted exemption from the law of the land essentially because it is a large and powerful concern and thus the more serious is the evil of forbidden over-production.

At R. 69, the limits of the novel and arbitrary "exception" are left totally vague.

> "What the decision would be *were* a case presented where a new mine opened on non-Federal lands with

> inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume is not a matter for determination in this proceeding."

But this is exactly the case presented. The new Big Horn Coal Company filed a Federal lease application *before* they started their new state mine. This they did because of inadequate reserves for their planned scale of operation (which had to be and was asserted under oath in the application). Then, the very question to be determined is whether or not "existence for any period of years" (what period?) or "establishing a position of importance" (i.e., menacing size) can be substituted for the finding of market need required by the law of Regulation 193.3.

These ever-shifting attempts to side-step the plain language of the Regulation and its long-standing interpretation are indicative of the character of the entire proceeding. Even the last novel and contradictory construction or "exception" illegally attempted is stated in terms of the utmost vagueness and inconsistency, with the obvious purpose of making Big Horn its sole beneficiary.

The Court of Appeals' summary of the situation is worth repeating here:

> "Preliminary to the affirmative considerations which lead to a conclusion, we note that *the ground upon which the Secretary proposed to issue the Big Horn lease in spite of his regulation*, is *singularly unimpressive*. The reason he assigns is that Big Horn has a large, established business and so, *although the lease would not have been granted as of the date of the application*, it must now be granted. The fact is that Big Horn made its application even before it was incorporated, and *all its big business has been built up with full knowledge that it had no federal lease. It has now, according to the Secretary's view, hoisted itself by its own bootstraps.*

"*The Secretary does not claim that the regulation is invalid, and he does not propose to withdraw it or modify it. He does not claim that its sole recited condition for a new lease has been met. He does not deny the construction which he has hitherto given it. He proposes to write an exception into it.* He says that it was not intended to apply to the granting of a new lease to an existing company with a large business which alleges that it needs this coal to perpetuate that business. *No such exception can be gleaned from the terms of the regulation or from fourteen years of administrative construction.*

"*Sheridan Wyoming, on the other hand, also has an investment and a good business, which it has established in reliance upon and not in the teeth of the Departmental regulation.* The proposed exception would strip from that lease *one of its most valuable conditions*, a condition established by the Secretary *for the declared purpose of protecting then-existing lessees against ruin.*

"The 'good faith' of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized and, according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed venture. *It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.*" (R. 103; emphasis supplied).

B. NATURE OF THE SUIT.

The suit is brought by a long-standing Federal coal lessee to prevent petitioner or his agents from issuing, contrary to their statutory duties, certain Federal coal leases which would thereby create illegal and anarchic over-competition against appellant. Additional coal mines on Federal land constitute illegal over-competition unless a consumer need for their production exists (Reg. 193.3). Respondent is a member of the regulated and limited class—Federal coal lessees—given a legal right of protection

against such unneeded and anarchic over-competition by necessary implication of the Regulation. The Regulation binds appellee in this respect both as part of appellants' lease and as a statutory Regulation. Sheridan imminently is threatened with immense and irreparable harm of uncertain amount by the illegal issuance of the lease.

The original complaint alleged (R. 11 through 23):

(1) That Big Horn is a new coal mine, founded on state land in 1943 and that Big Horn simultaneously applied for the Federal leases (Complaint, Par. 5, R. 19);

(2) That appellant, promptly on learning of the application, filed protest (Complaint, Par. 6, R. 20);

(3) That the protest was fully litigated before the Department on the ground of violation of Regulation 193.3 (Complaint, Par. 7, 8, 10, 11 and 12, R. 20, 21);

(4) That the issuance of the lease is illegal because the necessary finding of fact under the Regulation has not been made (Complaint, Par. 12 and 13, R. 21, 22);

(5) That the Regulation has the force of statute (Par. 15, R. 22);

(6) That the lease is illegal on the independent ground that the land has been effectively withdrawn from the public domain (Complaint, Par. 14, R. 22);

(7) That plaintiff-appellant is a member of the special class established by the Regulation (Complaint, Par. 15) and that the imminent issuance of the lease will result in damage of large but unascertainable amount to plaintiff by creating further and more effective, but illegal, competition from Big Horn (Complaint, Par. 16) in the limited market for Monarch area coal (Graph, Exhibit F, appearing in Record here at R. 84, denominated Exhibit K Amended Complaint).

The Complaint prayed for temporary restraint, temporary injunction and permanent injunction against such illegal issuance.

This Court of Appeals affirmed the original ruling of Justice Holtzoff that the original complaint failed to state a cause of action because of want of standing to sue, noting however that the original complaint did not establish respondent's status as a Federal coal lessee nor set out the terms of its lease (R. 31-34); and indicating that, if pleaded, standing would exist (see R. 97, 98).

Respondent then promptly sought to amend the original complaint by adding the following allegations:

1. That appellant presently holds and has fully complied with a Federal coal lease issued in 1943, a successor to older leases. (Amended Complaint, Par. 1(d), R. 51).

2. The full text of appellant's lease. (Amended Complaint, Exhibit J, R. 77-84).

3. That, ever since 1934 the uniform departmental rule has required and resulted in the denial of any lease application unless the finding of consumer need, requisite under the Regulations, could be made. (Amended Complaint, Par. 1(c), R. 51).

4. That *in reliance on that rule*, and in accordance with the requirement of its lease, plaintiff has invested huge sums in mining equipment and the cutting of new entries (Amended Complaint, Par. 1(e) and (f) and (g), R. 52).

Relief identical with that requested in the original complaint was sought.

C. PROCEEDINGS BELOW.

1. Before Justice Holtzoff.

Originally, in November of 1947, petitioner filed a motion to dismiss respondent's complaint, supporting that motion with the following four points:

(1) The United States was a necessary party

(2) The Big Horn Coal Company was a necessary party

(3) The respondent had no standing to sue

(4) The petitioner was not bound by his own statutory regulation, but might exercise an over-riding absolute discretion.

Justice Holtzoff correctly ruled on the first two points; the United States was not a necessary party since petitioner was, under the theory of the complaint, issuing a lease in direct violation of his statutory authority and duties, created by the Leasing Act and Leasing Regulations; and Big Horn was not a necessary party, since until a lease was issued Big Horn could never acquire a legal right to it.

Further, Justice Holtzoff ruled in petitioner's favor on the latter two points. This he did despite oral argument (R. 26) based on the affidavit of the federal lease. Justice Holtzoff accepted the lease as a fact, as is indicated by his oral opinion.[19]

In retrospect, it is unfortunate respondent did not move to amend its complaint at that point to include its own lease.[20] Such amendment, however, appeared totally vain

[19] The plaintiff has a lease on other mineral lands . . . His lease contains no provision that no other leases should be granted . . ." (R. 17. See Affidavit of Current Facts (2), R. 26.)

[20] It should be noted, however, that the motion to dismiss was filed out of time, on the very eve of the hearing. See Argument, R. 5, 6. Thus, respondent's counsel had to act under the greatest pressure.

and unnecessary in view of Justice Holtzoff's previous consideration of the lease during argument and his sweeping adverse views of the substantive law, notwithstanding anything the lease might contain (Pars. 3 and 4, Opinion, R. 17).

Justice Holtzoff concluded by dismissing the complaint and denying preliminary injunction.

2. The First Appeal.

The Court of Appeals affirmed the action of Justice Holtzoff, indicating that respondent had not sufficiently pleaded its real claim:

> "*Appellant's second point is that it is, and has been for some time, a lessee of federal coal lands;* that the regulation above mentioned, having the force of a statute, was part of its lease; and that this combination of circumstances created in it a property right which was threatened with invasion by the new lease. Appellant says that the claim thus depicted falls within the doctrine of the Chicago Junction Case and kindred cases and under the general considerations which controlled the Court in deciding Federal Communications Comm'n v. National Broadcasting Co. (KOA) and similar cases. Those cases involved claimed protection against threatened invasion of special interests, amounting to property rights, created by statute or valid regulation, in persons in certain circumstances, or those having, or granted, contracts or licenses. *Under the decisions, those persons were entitled to sue. The difficulty with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands, or indicate the nature, content or extent of any lease.*" (R. 31, 32) (Footnotes omitted; italics supplied).

Respondent moved the Court of Appeals for permission to supply below those indicated deficiencies of pleading. Petitioner opposed, and an informal hearing was held. That Court then amended its judgment by granting leave to the District Court permit such amendment.

3. Before Justice Letts on Remand.

The day after that Court's mandate was received in the District Court, respondent filed an amended complaint as of course under Federal Rules of Procedure, Rule 15, and also filed a motion for leave to file said amended complaint. The amendments supplied the deficiencies of pleading indicated by the Court's opinion. Petitioner did not present an order on the mandate of affirmance to Justice Holtzoff until after this motion had been filed.

Petitioner did not formally move to strike the already filed amended complaint, but did oppose the motion for leave to file it. Justice Letts heard and overruled the motion and filed a memorandum opinion (R. 86).

The stated reason for overruling respondent's motion was "*the proposed new matter adds nothing material to the claim and issue presented by plaintiff in the original complaint.*" In the light of the Court of Appeals' opinion, this was a ruling, in the teeth of that opinion, that the amended complaint did not state a cause of action. Justice Letts' action was therefore tantamount to dismissal of the amended complaint with prejudice on a ground already indicated by the Court of Appeals to be error.

Accordingly, respondent promptly filed a general appeal from this order and simultaneously applied to the Court of Appeals for the continuance of temporary restraint. That Court granted the temporary injunction pending appeal and ordered the cause down for hearing.

4. The Second Appeal.

The Court of Appeals had held numerous and exhaustive hearings, formal and informal, comprising many, many hours in total. Accordingly, the Court of Appeals issued a lengthy and detailed opinion on January 31, 1949, reversing the denial of amendment in the teeth of the substantive law expressed in their prior opinion in order to protect their appellate jurisdiction. (See *infra* VI, p. 85).

To shorten further proceedings, that Court also expressed its views forcibly on all the issues in this controversy, particularly noting that

> "the ground upon which the Secretary proposed to issue the Big Horn lease is *singularly unimpressive.*" (R. 103) (Italics supplied).

and that

> "The proposed exception would strip from that lease one of its most valuable conditions, *a condition established by the Secretary for the declared purpose of protecting then existing lessees against ruin.*
>
> "The 'good faith' of Big Horn, upon which the Secretary rests his present position, has no relevance to the issue here presented. Of course Big Horn acted in good faith. It applied for a federal lease the day it was organized and, according to the complaint, was perfectly frank in stating that the federal land was necessary to its proposed ventifre. *It never at any time, so far as this record shows, attempted to gloss over the fact that it desired the regulation either changed or ignored.*" (Italics supplied).

The quoted comments on Big Horn's good faith should be read in the light of the astonishing purport of the Big Horn brief *amicus curiae*, and the silent admissions contained therein; Big Horn violently objected to respondent's opening brief, collected certain isolated factual statements from it, placed them in juxtaposition and urged that they constituted a charge of impropriety as follows: that Big Horn's "singular" persuasiveness[21a] with Wyoming officials and officials of the Department of the Interior was due to the following factual picture: the enormous size and resultant widespread interests of their corporate parent,

[21a] That their persuasiveness was unique may be seen by the storm of industry-wide protest the departmental action aroused from the Western coal associations and the United Mine Workers (see *supra*, p. 7). Big Horn did not attempt reply to respondent at oral argument or by answering respondent's reply to the brief amicus curiae. Respondent will file certified copies of both these briefs with the clerk of this court, for the court's convenience.

Peter Kiewit Construction Company, a huge road-building and general contractor with headquarters in Denver, Colorado, where, for some reason, the oral hearing in this Wyoming controversy was held.

Respondent replied specially, noting that it had nowhere made the charge or assembled these facts. Respondent further remarked that it was singular Big Horn neither could nor did deny any element of the factual picture which they had assembled and which, they themselves claimed, provided an inference of improper influence by them.

SUMMARY OF THE ARGUMENT.

A. The time-honored and historic coal-land regulation here in question (43 C. F. R. 1933) requires that federal coal leases additional after its date (1934) shall be approved only where there is a consumer need for the production sought which can not otherwise reasonably be supplied. The regulation was originally adopted in 1934 for the purpose of mitigating and preventing the recurrence of then existing anarchic over-production from the unbelievably limitless low-grade coal reserves on the western public lands. Secretary Ickes, in his withdrawal letters (R. 57), cited eloquent descriptions by this Court in *Sunshine Anthracite Coal* v. *Adkins*, 310 U. S. 381, and in Justice Cordozo's brilliant dissent in *Carter* v. *Carter Coal Company*, 298 U. S. 238, of the terrible and bloody anarchy of over-production existing in the coal industry generally at that time, in supporting his action; the use of his law-making (*supra*) and withdrawal (*United States ex rel McLennon* v. *Wilbur*, 283 U. S. 414) powers under the Mineral Leasing Act and related legislation, to prevent this anarchy on the public lands and to protect existing federal lessees like respondent, in so far as it lay within his power, from this anarchy. This position of Ickes, and its citations, have been repeated and paid homage by the Department as recently as 1946, in the *Cox* and *Olson* cases. (R. 71-76) The

amended complaint alleges (Amended Complaint, First, R. 51) and the petitioner was unable to produce any contrary precedent on a most unusual and insistent inquiry by the Court of Appeals, that a uniform construction and practice has been consistently followed in the Department, of investigating and making a finding of market need in each and every successful application from 1934 to the present controversy; and of properly and consistently treating the regulation as a wise and binding rule of law "precluding" the grant of a lease unless the finding can be made or unless the regulation is formally repealed. In all of these decisions and in all of this practice, including the present controversy when it was before the Department, the Department has eloquently reaffirmed the timeless wisdom of the policy embodied in the law expressly refusing to repeal it; but has, in this case, by astonishing and arbitrary administrative interpretation in the teeth of this uniform prior practice and precedent, determined to make a single not-to-be-repeated "exception" on what the Court of Appeals has correctly characterized (R. 104) as the "singularly unimpressive" ground of self-imposed "hardship" to the war baby Big Horn Coal Company. This situation petitioner conjures from the application to Big Horn of the law, just as it was uniformly construed and widely published at the time in 1943 when Big Horn began its operation on a state "school district" isolated in the federal reserves, simultaneously swearing that it must have federal coal and "not glossing over the fact it wanted the regulation either changed or ignored." (R. 104). Petitioner makes no serious effort to controvert this showing of violation of the uniform prior law. He instead devotes his major effort to twist the real facts and history to come within inapplicable technical doctrines, "sovereign immunity", "want of standing to sue", designed to prevent respondent from stopping the virtually confessed violation of this wise and historic restrictive law designed for its protection and the protection of the western public lands coal industry;

and from thus preventing the ruin of respondent's own property and business by arbitrary abuse of power in the teeth of the protection of the regulation respondent bargained for and obtained (Amended Complaint, First (g), R. 52); and relied upon in investing huge sums in modernization and expansion (Amended Complaint, First (e), R. 51)

B. The Mineral Leasing Act, 30 U. S. C. 181 *et seq*, delegates *legislative* power to the Secretary of the Interior to make regulations, having the force and effect of statute, and so to create a healthy and sane coal industry on the public lands, 30 U. S. C. 189, and requires him to govern issuance of federal coal leases by *general* regulation, 30 U. S. C. § 201. He is required by the Administrative Procedure Act and related legislation to publish in the Federal Code of Regulations such of these as are of "general applicability and legal effect" and not mere "internal management directives". He so promulgated this regulation in the Federal Code of Regulations. Repeated subsequent reenactment of the parent Mineral Leasing Act by Congress after the regulation was formally promulgated amounts to adoption of the regulation by Congress. *R. J. Reynolds Tobacco Co.* v. *Helvering*s, 306 U. S. 110. (1939).

As the Court of Appeals held, it is thoroughly settled law that such regulations, issued under a Congressional delegation of legislative power, have the force and effect of statutes (*Hodgson* v. *Midwest Oil Co.*, 297 U. S. 293) and bind the department issuing them until formally altered or repealed. *Consumers Power, et al.*, 6 S. E. C. 444 (1939); *United States* v. *Perkins*, 79 F. 2d 533; *Sibray* v. *United States*, 282 F. 2d 95, and the principle has particular application to the regulations and practice of the Land Department, involving as they do the desirable security of land titles. *Germania Iron Company* v. *James*, 89 Fed. 811. This leading case, almost upon all fours with the present one, is pointedly ignored by petitioner. He similarly fails to cite

the leading Land Department language interpretation cases of this Court (*Work* v. *Mosier*, 261 U. S. 352, 360 and *Work* v. *McAlester*, 262 U. S. 260), which exemplify the sound principles that the Secretary of the Interior can neither avoid his ministerial duties under plain statutory language of the land laws nor evade and ignore his own uniform prior construction of language possibly otherwise dubious. Petitioner relies instead upon the totally inapplicable rule of strict construction of dubious language, claimed to grant perpetual or otherwise unreasonable private monopolies, such as *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, and ignores the different rules applicable to uniformly construed reasonable regulations and contracts restricting against anarchic and harmful over-competition (*Walla Walla Water Company* v. *Walla Walla*, 172 U. S. 1, and *Superior Water Company* v. *Superior*, 263 U. S. 125), not to mention the fact that *Frost* v. *Corporation Commission*, 278 U. S. 515 completely rebuts the application of the doctrine of *Charles River Bridge*, a historic standard regulatory criterion such as market need.

C. Respondent has a right to prevent the virtually confessed violation of this law, to its irreparable ruin, on two separate and independent grounds of special relationship to the law in question, one of property right arising from its lease, *Frost* v. *Corporation Commission*, 278 U. S. 515, the other of regulatory status. The regulation is a term of appellant's lease on the following grounds: through express inclusion of the Mineral Leasing Act in paragraph 1 of the lease (R. 78), with resultant necessary inclusion of the regulations which have become a part thereof, *supra* B; through express reference to the regulations in paragraph 6d (R. 83); by estoppel, since the respondent has made heavy investment in justified reliance on the regulation and its uniform interpretation (R. 52); by operation of law, since every contract incorporates relevant law regardless of express inclusion (*Wood* v. *Lovett*, 313 U. S.

362); nor have the *Tennessee Power Company* v. *TVA*, 306 U. S. 118, and *Alabama Power* v. *Ickes*, 302 U. S. 474, cases, so heavily relied upon by petitioner to rebut this showing, any relation whatever to the wholly different factual and legal background of the present case. Here the regulatory law is expressly designed to prevent anarchic over-competition for the protection of the western public lands coal industry, including respondent. Wasteful over-competition is thus itself prohibited by law, and we have not, as in those cases, a situation in which a competition, unprohibited and unrestricted by regulatory law, is claimed rendered "illegal" by some remote illegality in the particular competitor's organization or financing.

Respondent has a second independent ground of legal standing to challenge issuance of the Big Horn lease, by virtue of its status of legitimate membership in a specia. class, the public lands coal industry, deliberately and formally regulated against anarchic over-competition. This status right rests, as the Court of Appeals said, on the considerations underlying the judgment of this Court in the *Chicago Junction* case (*Baltimore and Ohio Railroad* v. *United States*, 264 U. S. 258), and the radio cases, notably *Federal Communication Commission* v. *National Broadcasting Company* (*KOA*), 319 U. S. 239. In those cases a threat of an arbitrary administrative departure from a settled statutory criterion designed to prevent anarchic over-competition or unfair competition was preventable because they violated special rights of the plaintiff necessarily implied in that regulation of destructive competition itself, for the benefit and protection of legitimate competitors. In response to proof of respondent's plain regulatory special interest and of its property right in the regulation, petitioner first chiefly devotes himself to an effort to prove the absurd premise that Secretary Ickes and his successors intended no regulation of the western public lands coal industry against wasteful and anarchic over-competition. (See *supra*, 20). Petitioner's second effort to pre-

vent enforcement of the regulation seeks to confuse the real issue, that respondent has a *special right* against anarchic over-competition on the public lands, with the obvious fact that Congress had no need to and did not provide a *special forum* for review of decisions of the Bureau of Land Management, in order to prevent outlandish, novel and arbitrary administrative discrimination against regulated status and destruction of plain property rights such as is present here. Congress of course is aware that the Courts have been adequately able to correct such efforts in public lands cases under their normal equity powers in a time-honored line of cases, a bare handful of which are *Lane* v. *Hogland*, 244 U. S. 175, *Work* v. *Mosier* and *Work* v. *McAlester*, *supra*, and *Santa Fe Pacific Railroad* v. *Fall*, 259 U. S. 197. Congress cannot be assumed by its mere silence to has disapproved normal equity protection by a constitutional court of property rights against disregard of statutory ministerial duty in the time-honored manner of the land cases, Cf. *Scripps-Howard Radio* v. *Federal Communication Commission*, 316 U. S. 4, 11, but instead expects it.

D. While, of course, the equal protection clause of the Fifth Amendment is not specifically a part of the Fifth Amendment, rank administrative discrimination without a reasonable basis of classification is violative of the basic requirements of justice and fair play of the due process clause of the Fifth Amendment. *Hamilton National Bank* v. *District of Columbia*, 156 F. 2d 843 (1946). As we have shown *supra*, the novel construction claimed for the first time in the District Court, contrary to the settled precedent and practice of the Department for fourteen years, is such a rank discrimination. The respondent, like every other applicant, has been required since 1934 to meet the criterion of Regulation 193.3 and to do so every time that respondent applied for a renewed federal lease, (Complt. R. 51) whereas a single exception is to be made for the Big Horn Coal Company on account of the size of the over-competi-

tion that it creates. Such retroactive "repeal", without any of the formal steps required by the Administrative Procedure Act, is prohibited by the doctrine of *R. J. Reynolds Tobacco Company* v. *Helvering*, 306 U. S. 110 (1939), and *Helvering* v. *Griffiths*, 318 U. S. 371 (1943). Even if it be assumed, contrary to the obvious fact, that the petitioner in the case at bar has endeavored to exercise his legislative power, the Mineral Leasing Act has been repeatedly amended since Regulation 193.3 was promulgated in 1934, the last time in 1944. 58 Stat. 275. The *Germania Iron* case, *supra*, and its indignant language at a similar arbitrary effort by another Secretary to upset settled practice on which land titles depend is equally applicable here.

E. The United States is not a necessary party to this suit which seeks only negative relief against the petitioner personally to prevent him from exceeding his authority in violation of the very laws of the United States under which he claims his sole authority.

It was not necessary for the Court of Appeals to reverse the District Court on this point. At the outset the District Court had held it an elementary proposition that the presence of the United States was not required here where a government officer was sued personally to prevent him from exceeding his authority.

A long line of classic authorities demonstrates the District Court's point:

Rolston v. *Missouri Fund Commissioners*, 120 U. S. 390;
Pennoyer v. *McConnaughy*, 140 U. S. 1;
Scully v. *Bird*, 209 U. S. 481;
Atchison, T. & S. F. R. Co. v. *O'Connor*, 223 U. S. 280;
Philadelphia Co. v. *Stimson*, 223 U. S. 605;
Waite v. *Macy*, 246 U. S. 606;
Payne v. *Central Pac. R. Co.*, 255 U. S. 228;
Santa Fe Pac. R. Co. v. *Fall*, 259 U. S. 197;

Work v. Louisiana, 269 U. S. 250;
Larson v. Domestic and Foreign Corporation, 337 U.S. 683.
Hynes v. Grimes Packing Co., 93 L. ed. (adv.) 965

The respondent has not claimed any interest whatever in the unleased lands of the United States, contrary to the erroneous factual impression which petitioner seeks to create, without trial of his assertion. He claims that respondent is "proceeding against property in which the United States has an interest". But respondent's only property claim is an indisputable right to its own regulated business and leasehold interest, which it here seeks to defend against the irreparable impairment which the petitioner's lawless and unauthorized action would accomplish. It is the leasing laws of the U. S., designed to prevent chaotic overcompetition against the respondent and the federal land coal industry, which prevent the issuance of the questioned leases to Big Horn, upon its bold demand for a special privilege of exemption.

Petitioner does not seek to compel specific performance of *anything*, contrary to petitioner's conjured invention. He seeks to create the erroneous factual impression that respondent here is attempting to compel some unspecified positive action from the United States through the device of requesting relief which is negative in form only. He cannot point out just what the fancied positive relief could be, but rather employs the voluminous citations of cases having no application here. The plain truth is that neither the United States nor the petitioner would be required to do one single positive act. The relief requested here would only *prohibit* petitioner from violating the leasing laws of the United States in this one instance, which is required by his statutory duty in any event. The public lands of the United States would remain freely disposable pursuant to its laws as they have always been.

The cases which petitioner cites all contains distinguishing qualification in recognition of the familiar rules that

where no positive performance is sought to be compelle from the sovereign, and the relief sought in actually neg tive against a government officer personally to prevent a exceeding of his authority and violating his duty, th United States is not a necessary party. Likewise the *La son* case, *supra*, which is cited by petitioner clearly re ognizes the distinction by express qualification therefor i its doctrine.

F. In reversing the District Court's refusal to allo amendment of the complaint, it was necessary to the pro tection of its appellate jurisdiction for the Court of Ap peals to indicate in its opinion, protection for the mandat which would, thereafter, issue. The means which it adopte —a continuance of the District Court's own temporary re straint, which was necessarily subject to all the qualifica tions thereof—was proper and could not possibly be mis understood as the equivalent of a statutory preliminar injunction under Rule 65, FRCP, as petitioner charges. I its temporary restraint, the District Court has specificall allowed for a further hearing on preliminary injunction i the event the complaint was amended. (R. 109).

In any event, the issuance of the mandate of the Cour of Appeals was stayed by petitioner, and assuming *argu endo* the non-existent injury which he now anticipates, hi remedy would be in the Court of Appeals where he cou have the matter clarified before issuance of the mandate Petitioner has no right to rely here upon a supposed erro never called by him to the attention of the Appellate Cour in the usual way.

It is clear that the District Court refused to conform t the substantive ruling of the Appellate Court's prior de cision. The District Court, after the first appeal, plainl ruled that amendment of the complaint would "add nothin material," despite the Appellate Court's prior decision tha the result would be different if the allegation of respon dent's lease had been made in the complaint.

The District Court's adamant refusal to follow the distinction drawn by the Appellate Court's first opinion, needlessly required the expenditure of extra time and effort by the parties and the Court of Appeals in necessitating additional consideration of restraint by the appellate court and an additional appeal.

ARGUMENT.

I. REGULATION 193.3 PROHIBITS ISSUANCE OF THE BIG HORN LEASE.

1. The threatened violation is plain; and this controlling issue is avoided by petitioner.

Petitioner has no heading in his latest brief, "The proposed lease to Big Horn does not violate Regulation 193.3", nor any similar one, nor is the substance of this contention anywhere clearly and forthrightly made. This contrasts with his earlier briefs below, and his administrative decisions, which, while they vacillated from one excuse and rationalization to another, denominated "constructions of 193.3", nevertheless sought to meet this fundamental issue. On the contrary, the major efforts in his latest brief are designed uniformly to avoid meeting this basic issue head on, by concentration on preliminary, technical and utterly inapposite arguments such as sovereign immunity, want of standing to sue, strict construction of statutory grants of irrevocable privilege, and even, astonishingly enough, invalidity of the Regulation if construed in accordance with his own fourteen years of uniform prior construction.

Respondent considers that the one fundamental issue in the controversy on which all others turn is exactly the one petitioner has thus avoided. If the Regulation is being violated, every one of petitioner's finespun theories falls of its own weight. For, thereafter, respondent's next point (II) is hornbook law—that the Leasing Regulations are part of the law of the land; and hence petitioner's theory of sov-

ereign immunity becomes a patently erroneous claim of right to violate, disregard, and act in the teeth of his statutory authority and duty, expressed in the Leasing Act and the Regulations which have been issued under it; and then, standing to sue follows easily from the Regulation as petitioner and his predecessors have always construed it: *i.e.*, as a wise and timeless conservation law designed to prevent the chaos and anarchy of coal over-production in the public lands states and to preserve the economic health of the existing Federal lessees by restricting production to market need; this necessarily confers a right on the holder of a Federal lease incorporating the Regulation to protect his property against an administrative officer arbitrarily threatening to exempt a single favorite newcomer from the law, while reaffirming it in his legislative capacity.

2. Regulation 193.3 prohibits issuance by its terms, purpose and uniform interpretation.

Both the original and amended complaints allege that the petitioner has not made and cannot make the requisite finding of fact, *i.e.*, that there is market need for Big Horn's production. These allegations stand undenied. (See, for fuller treatment, "Statement of fact", *supra*.

The terms of Regulation 193.3 prohibit issuing a lease to Big Horn without this finding:

> "Showing Required That an Additional Coal Mine Is Needed.
>
> The General Land Office *will* make favorable recommendation that leasing units be segregated and that auctions be authorized *only* in cases where there has been furnished *a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise* be reasonably met." (Italics supplied). (Reg. 193.3 F. C. R. 43).

Regulation 193.3, promulgated in February 1934[21b] was de-

[21b] Reprinted as Exhibit F, Amended Complaint, R. 70.

signed to prevent the creation of unneeded new coal mines. The coal industry is normally sick. The creation of new unneeded Federal mines would obviously have a disastrous effect upon the investment and revenues of existing Federal coal lessees. The terms of the withdrawal letters (Exhibits A and B, R. 57, 58) which immediately preceded the promulgation of the Regulation further clarify this point and elucidate the high policy of law behind the regulation. A chief purpose of both actions was to prevent the creation of unneeded competition for existing Federal coal lessees. The Sheridan-Wyoming Coal Company, as a then existing Federal coal lessee, is plainly protected by the policy and purpose of the Regulation. Sheridan was and is a part of the protected class—the then existing Federal coal industry.

The Sheridan-Wyoming Coal Company, since the war-inflated local demand is returning to normal, is presently faced with imminent disaster and eventual bankruptcy. The new competition of Big Horn on their State land has already taken half the market for Sheridan area coal. (Exhibit K, R. 84). This, coupled with the rapidly declining quality, threatens the very existence of Sheridan-Wyoming.

In the three recent prior decisions within the Department (which restate the position of the Department in some forty other unreported cases since 1924), the Regulation was reaffirmed and clearly and correctly construed. In *Carl T. Olson*, decided March 25, 1946 (R. 71), and the same case on rehearing December 19, 1946 (R. 75), together with *Lyman Ray Cox*, decided September 3, 1946 (R. 46), the Regulation was properly treated as follows:

> (1) The appellee invoked the "*rule*" of 193.3 as a *rule* having the force and effect of law which "*precluded*" granting a lease to an unneeded mine.
>
> (2) The appellee treated the policy which it controlled as one of the broad public significance affecting

third parties *and especially protecting the existing coal lessees.*

(3) Appellee specially indicated that the Regulation would have to be repealed before its policy was abandoned;

(4) The Regulation was *invoked specially as a part of the Federal Code of Regulations* as it would have to be under the meaning and language of Title 5 U. S. C. A. Sec. 511.

Specific reference to the above conclusions from the *Olson* and *Cox* cases are as follows:

(1) The second Olson decision states (R. 75):

". . . The ground for the *decision* was a *finding* that there is *already sufficient productive capacity in the vicinity to meet the demands of the market* . . . In such cases the *rule* of the Department *precludes* the granting of an additional coal lease (43 Code Federal Regulation 193.3). Further, upon examination of the reasons which gave rise to the establishment of the rule the decision concluded that it would be contrary to the public interest to *abandon this rule.*" (Italics but not parentheses supplied.)

(2) The previous *Olson* decision, dated March 25, 1946, contains the following significant conclusion (R. 74):

'On the contrary, the course of wisdom would indicate that it should carefully refrain from accentuating a condition *which may bring depression* upon a great industry . . .

"This consideration, taken in conjunction with the position of the Department as a present and potential royalty owner, indicates that *revision* of the Departmental *rule* at this time *would be harmful to the lignite coal industry and not in the public* interest." (Italics supplied.)

(3) The *Lyman Ray Cox* case, No. A24405, dated September 3, 1946, after a recital of 43 Code Federal Regulations 193.3, stated:

> "This *regulation* was *promulgated* in 1934. The propriety of continuing the regulation was recently examined in detail and it was concluded that the *repeal* of the regulation would be harmful *both to the bituminous coal industry* and to the public interest.". (R. 77.)

The frequent use of the word "*rule*" is most significant. "Law" may be defined as a Rule of action mandatory in form, properly promulgated and enforced by a competent authority. Throughout these opinions we have references to the Regulation as a "rule"; we have promulgation in the place required by Congress, from whom all the Secretary's authority over public land is derived; we have therefore the Secretary, the authority duly appointed and competent, exercising his delegated rule-making power; we have him enforcing his Regulation as a binding rule; we have a rule which is in terms mandatory (the words "will" . . . "only"). In short, the Regulation fully satisfies the definition of a law.

These decisions unmistakably require the conclusion petitioner is powerless to issue the leases in the absence of need, since they reiterate he is precluded from and powerless to do so *in view* of the Regulation, save for the alternative of *formal repeal or modification* of the Regulation. No reference can be found to any overriding power to make a "hardship" exception.

In terms, the Regulation is directed to the Bureau of Land Management. But the Bureau of Land Management is the sole body which exercises the judicial and administrative functions relating to public lands delegated to the Secretary of the Interior by the Congress. In order to have a government of laws and not of men in this country, it is clear that the Secretary of the Interior cannot first make a mandatory rule for the control of his sole tribunal and for the protection of the rights of third parties, and then assert the right to exercise one-man government, and ignore his own regulation with the force of statute, be-

cause he has not expressly said, "I am personally bound by this Regulation." *Indeed, he did not say that he is not bound in his decision.*

It should be carefully noted that in the various departmental decisions in the case at bar (R. 59-70), the Regulation has *not* been *abandoned* but has again been *reaffirmed*, no doubt for the reasons so eloquently stated in the *Olson* cases.

In all previous cases, treated essential to a favorable decision that market need should be found, and the uniform and routine departmental practice has been to conduct extensive investigations to assess the market need before passing on every application.[22] But there has never been the slightest hint that the mere fact of being a large but new "going concern" was any reason for exemption from the application of the Regulation.

Thus, the arbitrary and capricious discrimination in favor of Big Horn stands revealed for what it is.

3. Petitioner has scarcely tried and totally failed to disprove violation.

As noted in the introduction, petitioner's answer to this showing that the proposed lease violates the Regulation is never forthright and direct. It must be winnowed from among the chaff of more technical and completely inappropriate theories.

Under a heading aimed at respondent's standing to sue[23] petitioner first repeats in novel disguise (p. 20-21) the somewhat disingenuous contention, so convincing rejected by the Court of Appeals, that the Regulation binds only his subordinates, the General Land Office, and not himself; that he has some peculiar overriding "discretion" to make

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[22] Amended Complaint, R. 51.

[23] "A. The regulation does not purport to vest any rights in respondent or other lessees, and it would be contrary to settled principles of construction to give it the effect prescribed by the court below."

arbitrary administrative "exceptions" to the statutory regulation and its settled prior construction. The argument essentially boils down to "Do as I say, not as I do." Petitioner attempts no answer to any of the five cases[24] cited and heavily emphasized by the Court of Appeals to overrule this contention for its essential lawlessness.

The Court of Appeals said:

> "The regulation was published in the Federal Register as one of general applicability and legal effect. It had the force and effect of statute. As such, it was binding upon the Secretary until repealed or modified by him. Judge Sanborn's opinion in *Germania Iron Co.* v. *James* and Commissioner (now Circuit Judge) Frank's opinion in *Consumers Power Company et al.* should be read in full upon this point. Other authorities are cited below."
>
> "The regulation meant what the Secretary held it to mean. When he promulgated it, he said it reached 'substantially the same effect' as a withdrawing of the land from leasing. Thereafter he consistently held that it precluded the grant of leases to these lands unless market need for additional coal was shown." (R. 104.) (Citations omitted, emphasis supplied.)

Petitioner does not even cite *Germania*, the leading case on the subject.

As a member of a specially limited and regulated class (see *infra* III), respondent is lawfully entitled to rely upon the long established practice, custom and usage of appellee and his predecessors in denying leases for unneeded mines. Petitioner cannot commit a violation of the practice, as such, let alone where the practice has become a statutory regulation. Nowhere is the principle of "stare decisis" dearer to the law than in matters affecting land.

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[24] *Germania Iron Co.* v. *James, supra, Consumers Power Co. et al.*, 6 S. E. C. 444 (1939); *United States* v. *Perkins*, 79 F. 2d 533 (C. C. A. 2d 1935); *United States* v. *Dunton*, 288 Fed. 959 (S. D. N. Y. 1923); *Sibray* v. *United States*, 282 Fed. 795 (C. C. A. 3d 1922).

A case so closely analogous to the present one as *Germania Iron Company* v. *James*, 89 Fed. 811 (C. C. A. 8, 1898) would not have been totally ignored by petitioner save that no reply is available to him. In the *Germania* case, it was alleged that the action taken on a motion for the exercise of supervisory authority by a successor Secretary of the Interior was illegal under a long-standing rule and practice of the Department. The rule in question provided that land once withdrawn was not open to entry until the decision of the Secretary of the Interior making it open to entry had been communicated to the local Land Office.

Five years later, after full litigation before the Department, the successor Secretary ruled that the land had been opened to entry immediately the Secretary filed his decision, ignoring the prior rule that the decision had to reach the local Land Office. It was urged, as here, that the Secretary had full discretion notwithstanding a contrary rule binding upon his subordinates.

The Court disposed of that contention in the following language:

> "*System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the land department as in the courts.* Doubtless every applicant for this land, but one, relied upon the settled practice of the department, and presented his application for it at 9 o'clock in the forenoon of February 23, 1889; yet that one who violated the rule and practice, and made application to the officers out of office hours, and before the land was open for entry under the practice of the department, has defeated all the others. He who came in by some other way has defeated every applicant who came "by the door." *What a farce the attempt to secure rights in any judicial tribunal must become, if its rules and practice are ignored or applied at the arbitrary will of the judge who presides over the court!* Under such an administration of the land department, the rights and titles

which the law attempts to protect and secure *would become naught but privileges dependent upon the gracious favor of its officers.*" (*Id.* at 818. Italics supplied.)

So, in the instant case, has the Sheridan-Wyoming Coal Company relied upon the settled practice of the Department and publication thereof in the Federal Code of Regulations.[25] See the *Cox* and *Olson* cases, *supra*, pp. 31, 32. It has expended money in creating a modern mechanized mine; believing it was protected from unneeded competition by the statutory regulation and the long standing practice thereunder.

The more recent cases cited by Court of Appeals reinforce the necessary conclusion from *Germania*.

In *Consumers Power Company* the Commission rejected the contention that it could, under some supra-legal "discretion," refuse to apply an existing regulation without repealing it. Commissioner (later Circuit Judge) Frank held that:

> "Since Rule U-9C-3 (14) is a valid exercise of rule-making power, it has the force and effect of law. * * * The existence of the power to amend old rules and make new ones permits an administrative body to achieve flexibility without disregarding the provisions of a rule which it has adopted and which stands unchanged." (At 33 F. 11-2, Pike and Fisher, Administrative Law Decisions—6 S. E. C. 444 (1939.)

In *Perkins* (79 Fed. (2d) 533, C. C. A. 2d, 1935) the Secretary of Labor and her subordinates had only partially observed a regulation which directed the subordinates to forward to the Secretary the record of their recommendations with respect to an Immigration hearing. The Second Circuit unanimously held that:

> "Since the rules of the Labor Department have the force and effect of law and are binding upon the De-

[25] Amended Complaint, First (e) (f), and (g) R. 52.

partment as well as upon the alien, the failure to follow this rule resulted in an unfair hearing contrary to that to which the alien was entitled in this proceeding." (79 Fed. at 534.)

In *Dunton* (288 Fed. 959) the Assistant Secretary of Labor and his subordinates had chosen to disregard a Departmental rule permitting the presence of one friend of an alien in an Immigration hearing. Augustus Hand, then sitting on the District bench for Southern New York, said:

> "I should undoubtedly dismiss the writ [habeas corpus] were it not for the fact that the Department had *failed to observe its own rule* in respect of hearings. * * * *The hearing was without due process of law.*" (Parenthetical matter and emphasis supplied; 288 Fed. at 960.)

In *Sibray* (282 Fed. 795) the Commissioner of Immigration and his subordinates had ignored an Immigration regulation which had been promulgated under the standard type of statute authorizing general regulations by the Commissioner General of Immigration.

The Third Circuit unanimously held that if officers of the government were to be judicially permitted to ignore their own law:

> "*the administration of this statute will be according to the caprice of men, and not according to the fixed requirement of law.* Aliens must be deported according to law, and not according to men. This statute must be administered according to its terms and the rules established by the Commissioner General of Immigration. *Those charged with the enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment, to set aside any one of the rules on which the rights of aliens depend.* * * * Congress, in its wisdom, has enacted a statute, under the provisions of which, in accordance with the rules established by the Commissioner General, certain aliens may be deported, and every alien charged with crime has the right to rely upon the ob-

servance of the statute and those rules by those charged with their enforcement in a proceeding to deport him. *It is not within our province to speculate in any particular case what effect the disregard of those rules might or might not have.*" (282 Fed. at 798; emphasis supplied.)

It may be noted, also, that the immigration cases cited have application to the problem of standing to sue (see *infra*, p. 53). Arbitrary departure from departmental rules was sufficient to justify the Court in calling forth the extraordinary remedy of habeas corpus.

The Court in the *Germania* case also emphasized (89 Fed. at 813) that the Land Department of the United States (now the Bureau of Land Management) is a judicial tribunal, and that its substantive rules, like those of a court, have the effect of law.

Petitioner would buttress his indirect assertion of arbitrary personal power to ignore the Regulation with a single case—*Williams* v. *Wingo*, where a state legislature passed a statute granting an exception to a general statute restricting ferries. He silently infers he has exercised a similar *legislative* power here. It will suffice to ask why he has not published a new Regulation amending 193.3[36]; that is precisely what the state legislature did in the case cited—a statute was amended by a statute.

Petitioner then turns from the issue of violation or none of the Regulation and asserts a power to violate with impunity (Pet.'s Brief, 24, 25, 26)—arguing, with utter disregard of the history of the Regulation and its uniform prior construction, that it was "not directed toward protecting the competitive status of existing lessees"; and

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[36] It may be pointed out *passim*, that, in view of Congressional reenactment of the Leasing Act since publication of 193.3, and respondent's reliance, there is question of his power. *R. J. Reynolds* v. *Helvering*, 306 U. S. 110. But whether only Congress may now alter the historic Regulation is not here involved; he has not even tried to repeal or amend, but has expressly reaffirmed.

hence no lessee may complain of arbitrary violation by him. He says instead it was directed "mainly toward a policy of disposing of government coal lands in such a manner as would be to the greatest advantage of the Government as a landowner and of the people of the Nation as consumers." (Pet. Brief, p. 24.)

A sufficient answer is found right in the first departmental decision in this controversy.

> "The regulation referred to (43 CRF 193.3) was adopted *for the purpose of preventing ruinous competition in the coal industry within public land states*, and provides that leading units will be segregated and auctions authorized only upon a 'satisfactory showing that an additional coal mine is needed and there is an actual need for coal which cannot otherwise be reasonably met'." R. 59 (emphasis supplied.)

Far more eloquent are the *Cox* and *Olson* cases, just prior to the Big Horn controversy, which petitioner has conceded represent the uniform prior construction.[27]

Thus, petitioner quoted in his first *Olson* decision, Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*[28]: "Overproduction was at a point where free competition had been degraded into anarchy" and *Sunshine Anthracite Coal Co.* v. *Adkins*[29]:

> "Overproduction and savage competitive warfare wasted the *industry;* labor and *capital* alike were the victims. *Financial distress among operators* and acute poverty among miners prevailed even in periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink." (Emphasis supplied.)

Petitioner went on to reaffirm the likelihood of recurrence of anarchic over-competition, and rested on the gen-

[27] Amended Complaint, First (C) R. 51.
[28] 298 U. S. 238, 330 (1936).
[29] 310 U. S. 381, 395 (1940).

eral public interest. Obviously, from the italicized portions above, this rested in no small part on the special interest of the operators in protection against anarchy.

But if this were not enough the Department rested squarely upon the welfare of the "bituminous coal industry" in *Cox*; refusing a lease to a small mine.

> "The propriety of continuing the regulation was recently examined in detail and it was concluded that repeal of the regulation would be harmful *both to the bituminous coal industry* and to the public interest. (Carl T. Olson (A. 24226), March 25, 1946, (unreported.) The application advances nothing which would warrant revision of the regulation. Because of the applicant's representation that an additional supply of coal is needed, a further field examination was made. The report of the examination discloses that lack of demand has caused abandonment of a number of mines in the vicinity. It emphasizes that there is not sufficient market to give reasonable working time to the remaining small mines and that, within a year, large shipping mines in the vicinity will be working part-time." (R. 77.)

Obviously, the protection, on the one hand, of the Federal coal lessees from anarchic over-competition and the protection, on the other hand, of the Federal coal reserves and the revenues paid by those lessees are but opposite sides of the same coin—and the coin is a healthy, sane Federal coal industry, providing coal as needed to consumers, royalty to the United States, profit to efficient lessees, and steady employment to their workers. All this, 193.3 accomplishes; 193.3 is law; without repeal, and while expressly reaffirming the Regulation, petitioner says he may disregard the Regulation and its uniform construction by him; and nobody he injures can stop him.

Petitioner's next reference to the basic issue that he has violated the Regulation is an assumption that he has disproved it:

"Even if the regulation did so provide or even if it had been so construed by the Department of the Interior . . ." (P. 28, Pet. Brief.)

He would gloss over in silence the allegation of the Amended Complaint:

"(c) That throughout the entire existence of said regulation, since the date of its promulgation over fourteen years ago, defendant and his predecessors in office have not issued a single coal mining lease without a showing and a finding of the requisite need for an additional mine under said regulation; and that even since as recently as March, September and December of 1946, he has denied several leases because the required finding could not be made. Copies of these decisions, which the defendant has conceded represent the heretofore uniform rule of all such previous decisions under said regulation, are attached hereto and made a part hereof, marked Exhibits G, H, and I." (Amended Compl. First (c) R. 51.)

The last line (as to the concession by defendant) refers to an oral request by the Court of Appeals to counsel for defendant, during an early hearing on the propriety of restraint, to produce any prior administrative decision where a coal lease had been issued since 1934 without a finding of market need. After an adjournment for the purpose, petitioner's counsel conceded the Department was unable to find any such instance in its records and that the uniform prior construction was market need or no lease, as asserted in the Amended Complaint.

Having denied the plain truth thus admitted, petitioner then says, even if *violation be admitted, respondent's objection to flagrant violation* comes within inapposite technical rules dealt with *infra*, III and IV hereof.

II. THE REGULATION IS THE LAW OF THE LAND AND HAS THE FORCE AND EFFECT OF STATUTE.

A. The Regulation Has the Force of Statute.

The Secretary of the Interior has authority under the leasing act to issue all regulations necessary and proper for carrying out his functions of creating a healthy public lands coal industry. (Appx. Pet. Br. 70.) 30 U. S. C. § 189. He is, moreover, required to govern the manner of leasing by general regulation. 30 U. S. C. 201. (Appx. Pet. Br. 65.) Pursuant to this authority and duty he issued Regulation 193.3 and caused it to be published both in the Federal Register and in the Federal Code of Regulations.

It was his statutory duty under the Administrative Procedure Act and similar statutes to publish in the Federal Code of Regulations *those of his regulations which had the force and effect of statute.* His responsible agent, the Commissioner, has stated in the preface to the land regulations, including 593.3, that they are so published in pursuance of that statutory duty.

"FOREWORD

"This pamphlet contains the *codification* of the rules and regulations assigned to Par. 193, Title 43, of the Code of Federal Regulations. No amendments thereto have been made. The regulations were codified and published *pursuant* to Section 11 of the Federal Register Act, as amended (50 Stat. 304; 44 U. S. C. Sup. 311). Part 193 contains the regulations relating to coal permits, leases, and licenses, exclusive of Alaska. • • • The Federal Register Act makes the documents which were codified and published pursuant thereto prima facie evidence of the text of such documents and of the fact that they are *in full force and effect* on and after the date of publication"

• • •

"FRED W. JOHNSON
Commissioner."
(Italics supplied)

The pertinent provisions of the Federal Register Act (44 U. S. C. Supp. §311) referred to in the Foreword follows:

> "Report by Government agencies of documents issued: publication in supplement to Register.
>
> (a) On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete *codification* of all documents *which, in the opinion of the agency, have general applicability and legal effect* and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938, or on the same date of every fifth year thereafter. The Committee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register."
>
> • • •
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> "(c) The codified documents of the several agencies published in the supplemental edition of the Federal Register pursuant to the provisions of subsection (a) hereof, as amended by documents subsequently filed with the Division, and published in the daily issues of the Federal Register, *shall be prima-facie evidence of the text of such documents and of the fact that they are in full force and effect* on and after the date of publication thereof." . . . (44 U. S. C. Sup. 311) and 5 U. S. C. 1002 and 44 U. S. C. Sup. 305) (Italics supplied.)

Thus, the Department had told the world that Regulation 193.3 had the force and effect of statute by the act of publishing it in the Federal Code with a preface referring to these statutes. The petitioner, in the District Court, for the first time anywhere, asserted that the Regulation is a mere internal declaration of policy without the force and effect of law. It must be admitted that

counsel for respondent were astonished by this turnabout on the part of petitioner. This was the more astonishing because the Department had always decided prior cases on the basis of the Regulation as a binding rule of law forbidding such leases. (*Supra*, pp. 32, 33)

The contention cannot be sustained that the regulation was a mere internal directive for the guidance of Bureau of Land Management and did not bind the Secretary of the Interior.

Moreover, it is well settled that the land regulations of the Secretary of Interior have the force and effect of statute. *Hodgson* v. *Midwest Oil Company*, 297 F. 293. See *also Germania Iron Company* v. *James*, *supra*, p. 36.

In the *Hodgson* case, the issuance of a lease to the Midwest Oil Company would have been illegal, and the leasing act unconstitutional, but for a regulation of the Secretary of the Interior. This regulation provided the constitutionally necessary notice to other possible claimants which had been omitted from the Statute.

If these regulations can shore up the Leasing Act against constitutional attack, surely they must have the effect of statute. They cannot be mere pious platitudes of internal policy or mere directives to personnel, subject to the personal whim and caprice of the occupant of the Secretary's chair, as the petitioner so eloquently contends here (Pet. Br. 21), but formerly denied uniformly in his administrative decisions (R. 71, 75, 76).

On the contrary, the Court of Appeals was manifestly correct in ruling:

> "The Regulation was published in the Federal Register as one of general applicability and legal effect. *It had the force and effect of statute.* As such, it was binding upon the Secretary *until repealed or modified by him.*" R. 104 (emphasis supplied; citation omitted).

The petitioner's sudden, novel and arbitrary contention that the regulation is mere internal directive to subordinates

can have no merit, because if that were true it would have been expressly exempt from publication. The Administrative Procedure Act requiring publication of all regulations of general applicability and legal effect contained an *exemption* from the requirement of publication for any *internal* directives to subordinates.

The Administrative Procedure Act (5 U. S. C. 1001, *et seq*) requires publication of

> "substantive rules adopted as authorized by law and statements of *general policy* or *interpretations* formulated and adopted by the agency for the *guidance of the public*," (5 U. S. C. 1002 (a) (3)). (Emphasis supplied).

In this same section there is a complete and unqualified exemption for

> "any matter relating solely to the *internal* management of an agency" (5 U. S. C. 1002 (2)). (Emphasis supplied).

Thus, if the subject matter of the regulation had been a mere internal directive, as the petitioner now contends, he would not have been required to publish it as he told the world that he was in his preface. It is to be noted that petitioner makes no claim that he published the regulation by accident, and it therefore appears that he is willing to concede that his publication was purposeful and was meant to have some meaning and effect.

B. The Regulation is Valid, and the Court of Appeals Merely Adopted Petitioner's Long-Standing Interpretation in Accordance With the Plain Meaning of its Terms and With Its History.

Petitioner (Br. p. 41) claims, with astonishing inconsistency, that the Regulation is invalid if construed in accordance with the department's uniform and frequent construction for fourteen years prior to this controversy (*supra*, 30). Cleverly, he attacks his own Regulation

under the phrase "as construed by the Court below", glossing over the fact that the Court of Appeals had every right to rely[30] upon the uniform construction alleged in the uncontroverted amended complaint, the more since he had been given an unusual opportunity to controvert it, and failed. (See *supra*, 34.) Yet the Court of Appeals has manifestly done no more than to adopt the uniform construction if the simple and unmistakable language of the *Cox* and *Olson* departmental decisions has any meaning whatever. (See *supra*, 31.)

Petitioner now urges by footnote that he has a different and valid construction. "Status as an *existing* (state) mine", though acquired subsequent to their Federal application makes Big Horn a *non-additional* mine within the meaning of the Regulation. But this attempt to confuse the issue must fail.

The words of the Regulation are not "*new* Mine", nor "*non-existing*" mine; the words of the Regulation are "*additional* mine". While in the departmental decisions "new mine" has been used as shorthand for "additional mine", no error had crept into the results such as counsel for petitioner now urges. "*Additional*" is a word of reference. "*New*" is a word of time. Thus, it is obvious that a mine which is not now "new", and has existed for a brief period is still "additional" *to the situation as it existed in 1934* which is obviously, the only frame of reference which the word additional, used in the statutory Regulation, can have. In the first place, when a man says "additional" in 1934 he patently means "added to what exists in 1934". This view is confirmed by the explanation in the letters of Secretary Ickes (R. 57) that future leases are to be made under the Regulation only for small mines needed to meet local needs. It is thus clear that Secretary Ickes contemplated in using the word "additional" that he was laying down a rule forbidding the adding of Federal mines not in existence when he laid down the Regulation.

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[30] Many of the decisions under 193.3 are unpublished and unindexed thereto in the files of the Interior Department.

Petitioner has admitted that, in 1943, "In essence a new mine was created" (R. 64). Clearly, this is additional since 1934.

Thus, it is plain that petitioner would be construing a word not in the statute, namely, "new" (or "non-existing") and would thereby reach a result that could not be reached by construing the word actually present, namely, "additional". What could be more arbitrary and capricious?

In prior cases in which a controversy has arisen over duly alleged departure from the prior departmental construction of the land laws, the Secretary has formally answered in District Court, setting up the different construction he claimed, and gone to trial thereon if necessary.

Work v. *Rives*, 267 U. S. 175.

Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316.

Had not the simple truth of the prior construction respondent alleged prevented him, doubtless petitioner would have followed the orderly course of answer and spared this Court his present unseemly attempt to try this factual issue of the practice and unpublished discussions of the Department in a footnote:

> "And in a letter to the chairman of the House Committee on Public Lands dated June 9, 1947, regarding a bill to amend the Mineral Leasing Act to increase the maximum size of a coal leasing tract, the Acting Secretary, with obvious reference to this regulation, stated, 'Coal mining is and long has been a sick industry because of overproduction. For the past 15 years this Department in recognition of this fact has issued new coal leases or permits only upon a competent showing of the need for a new source of supply or *to continue an existing mine in operation*'." (Emphasis supplied; pet. Br. p. 34, footnote 9).

by quoting a single ambiguous phrase in his own mere self-serving letter, never subjected to cross-examination, *written in June 1947, after* this particular controversy had been

once decided by him departmentally. (R. 59.) Motion for rehearing was then pending before him on this very ground.

The leading Interior Department language construction cases plainly prevent petitioner from doing two things he is illegally attempting:

(1) Under the guise of "reasonable interpretation" to twist "black" to mean "white" in order to subvert the plain meaning of statutory language. *Work* v. *Mosier*, 261 U. S. 352; *Work* v. *McAlester*, 262 U. S. 200.

(2) To depart from an established and uniform *prior* contrary construction of statutory language.

The Secretary's power to construe a term of the land laws contrary to its actual and ordinary meaning has only been sustained in cases where the term itself was one of dubious meaning implying discretion—e.g., "speculative" in *Work* v. *Rives*, 267 U. S. 175. The *Rives* case itself was careful to point out the limiting principles of *Work* v. *Mosier*, 261 U. S. 352 and *Work* v. *McAlester*, 262 U. S. 200.

In *Work* v. *Mosier*, two limiting principles are enunciated.

(1) The Supreme Court pointed out that the Secretary of the Interior cannot construe "*black*" to mean "*white*". (He had endeavored to rule that "*bonuses*" for leasing oil lands were not "*royalties*" within the meaning of the statute, 261 U. S. at 357, 358); and

(2) The Secretary's "construction" of statutory criteria in a particular case *cannot depart from his long-standing contrary construction. Id.* at 360. (The Supreme Court struck down an attempt to limit royalty payments to an arbitrary monthly amount, *because they had grown very large*, where the practice had been to pay out all royalty received, under statutory direction to pay out "royalties", and required him by mandamus to carry out this ministerial duty).

Work v. *McAlester* reaffirms the established further principle that the Secretary of the Interior may not construe

language of command as language of permission. The statute ordered that, under certain fact conditions, the Secretary "shall" convey title to coal lands under his contract. He was mandamusable, the Supreme Court saying:

> "This is language of command" (262 U. S. at 208) "and brings the case within the rule of *Lane* v. *Hoglund* . . ."

Note that the language of the instant Regulation is also mandatory: "showing *required*"; "*will* . . . *only*", and has been uniformly so construed. *Supra* 30.

It would be astonishing that petitioner dignifies these leading cases only by mention of some of them in a footnote (Pet. Br. 34, footnote 9), while expounding at length upon the inapposite cases strictly construing dubious language claimed to restrict the power of *future legislatures* and to confer perpetual or otherwise unrestrictable monopolies such as *Charles River Bridge*, were it not that, as the Court of Appeals decided,[31] the cases closer to home were so uniformly and strongly against him.

But, passing over petitioner's manifest inconsistency, the Regulation, as construed, is plainly valid. All it does is to restrict leasing to a wise conservation standard—market need. Congress has delegated its plenary legislative power over the Public Lands[32] to the Secretary of the Interior only upon the explicit terms of the Statute. It has specifically empowered him to lease[33] but only in accordance with general regulations[34] published in the Federal Register[35]; and to withdraw lands from leasing.[36]

In answer to the showing thus made of the validity of the Regulation in accordance with its uniform prior construction which was adopted by the Court of Appeals,

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[31] R. 97.

[32] U. S. Const. Art. 4, Sec. 3.

[33] 30 U.S.C. 181, 201, set out at Pet. Brief 65.

[34] 30 U.S.C. 201, and 189. See *supra*.

[35] See *infra*.

[36] *United States ex rel McLennan* v. *Wilbur*, 283 U.S. 414, where the Secretary of the Interior's power to withdraw oil lands was upheld.

petitioner gives vent to three fallacies struck down by the Court of Appeals. The first is (Pet. Brief p. 42) that "power to withdraw lands does not carry with it authority to grant property interests". For this he quotes *Sioux Tribe* v. *United States*, 316 U. S. 317, ignoring that the withdrawal power of the Secretary in the instant situation must be coupled with the duty imposed by Congress of creating a healthy federal coal industry and both to govern it *by general regulation* and to issue leases *only pursuant to general regulation*.

Sheridan's property interest is created by its own lease under the Secretary's leasing and regulatory powers and not by the withdrawal power, which is cited merely to underline the broad powers of the Secretary to govern the mineral lands by general regulation.

But once he has exercised that delegated congressional power to govern by general regulation, and until he has validly repealed the general regulation in question, he is bound by it like any other citizen. Thus, petitioner's sweeping claim to a "discretion" (Pet. Br. p. 42 and 43), in his *ministerial* capacity and *not* in his *legislative* capacity, arbitrarily to ignore the Regulations he and his predecessors have made and formally promulgated in their legislative capacity, is readily unmasked as a claim to royal power to legislate and administer without distinction between the two very different functions such as the Administrative Procedure Act was expressly designed to prevent. *Wilbur* v. *United States* (Pet. Br. 42) cited by the petitioner for this remarkable claim of arbitrary power, was a case where a successor Secretary of the Interior, acting under a continuing authority to supervise rolls of an Indian tribe, reversed a determination of his predecessor that certain individuals were living as Cherokees. Its inapplicability is obvious. The plain meaning of statutory terms cannot change like the membership of an Indian tribe. The contention that a Secretary cannot bind his successors by issuing statutory regulations means, as here astonishingly

interpreted by petitioner, that every mineral leasing act regulation is automatically repealed the day a new Secretary takes office. Petitioner's entire argument here as elsewhere, depends upon the unstated premise, plainly untrue in fact, that he has endeavored to repeal the regulation.

Petitioner's next contention is resurrection of his oft-repeated fallacy that Sheridan possesses a monopoly, if the Regulation is enforced. He would overlook that he has admitted in one of his own decisions that Sheridan enjoys no monopoly[37] and that the regulation of any industry in an effort to prevent anarchic over-competition naturally and inevitably protects to some extent the market of the legitimate members of the industry. Here, as elsewhere, the entire premise of his conclusions is the silent claim that both he and the Congress have endeavored to change Reg. 193.3, when, in point of fact, both have reaffirmed it. The only thing at issue is his effort to make a single, arbitrary, and capricious "exception" in his *ministerial* capacity.

Petitioner next contrives an imaginary factual situation where either the applicant must mine the coal in question or no one will ever be able to do so, yet there is no market need for the production.

For this, there is of course absolutely no factual basis in the record. But, in any event, it is a most unlikely situation and one the remote possibility of which scarcely justifies a return to anarchic over-competition in the teeth of a formal regulation. The Regulation it seems might easily be amended to cover such a situation if one should ever arise, as it had not in fourteen years.

The weakness of the contention (Pet. Br. 40) that the statutory Regulation, as uniformly construed for fourteen years, infringes the prerogatives of Congress, is further exposed when it is considered that the Congress has repeatedly reenacted the Mineral Leasing Act[38] during the

[37] R. 67.

[38] *Infra*, 67.

long and well-published history of the Regulation. During that history, the Department wisely rejected the hardship pleas of many small, even primitive rope and shovel, miners and hewed to the line of economic sanity represented by the Regulation. It seems incredible that Congress would now be outraged if the Regulation were again applied as usual to the sizable war-baby Big Horn; on the contrary, Congress has sanctioned it, and in effect, ordered it.

III. RESPONDENT HAS A RIGHT TO PREVENT THE VIOLATION OF THIS LAW TO ITS IRREPARABLE RUIN.

The respondent has standing to sue on two separate and independent grounds and of special relationship to the law, one of property right arising from its lease, the other of regulatory status. As the Court of Appeals correctly held, Sheridan-Wyoming:

> "as possessor of a valuable right, created by contract in the presence of valid and binding restrictive regulations, has standing to sue to protect that right. The prevention of a breach of a restrictive provision in a contract is one of equity's most usual functions.
>
> The Secretary has wide discretion in the granting of federal mineral leases, but he has no discretion to violate or ignore an existing general departmental regulation which established one of the conditions upon which he entered into a contract of lease. [*Frost v. Corporation Commission, supra* note 4, and cases there cited. The proposition is much discussed in the opinions in recent cases involving radio broadcasting licenses. *Federal Communications Comm'n. v. National Broadcasting Co.*, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943); *Scripps-Howard Radio v. Federal Communications Comm'n*, 316 U. S. 4, 86 L. Ed. 1229, 62 S. Ct. 875 (1942); *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1940).]" R. 105.

A. From Respondent's Property Rights Arising from Contract of Lease.

The first independent ground of its legal standing to challenge the illegal issuance of the Big Horn lease arises from respondent's property rights under its contract of lease.

An almost identical factual situation was present in the case of *Frost* v. *Corporation Commission*, 278 U. S. 515 (1928).

There an individual cotton ginner holding a non-exclusive license from the governmental authority sought to enjoin the arbitrary issuance of a similar license to a prospective competitor, a cooperative cotton ginning corporation, without satisfaction of a statutory "finding of market need" criterion.

The Oklahoma statute governing cotton ginning as a specially regulated industry provided generally that "the (State corporation) commission may deny a permit for the operation of a gin where there is no public necessity for it and may authorize a new ginning plant *only* after a *showing* is made that such plant is a *needed* utility. (Id. at 519) (Italics and parentheses supplied.)

A subsequent amendment to the statute required the commission to issue licenses to cooperative corporations regardless of need (id. at 518). This amendment was held to be discriminatory and the classification unreasonable. Therefore the proposed issuance of the permit was held illegal and enjoinable as denial of equal protection of the laws and due process of law under the Fourteenth Amendment. In the instant case, of course, no amendment of the regulatory law is involved; merely an arbitrary and capricious interpretative departure therefrom (the element of discrimination is fully treated at 62, *infra*).

The defendant attacked the plaintiff's standing to sue and right to invoke equity to prevent even an admittedly illegal act on the ground that an invaded property right was lacking.

This Court held (1) that the non-exclusive license of plaintiff was supported by consideration thus creating a legally protected right in the form of franchise. The Court also held (2) that the discrimination forbidden by law necessarily casts its effect on the class discriminated against rendering enjoyable at its suit both *the author* and beneficiary of the discrimination. The opinion goes on to say at page 521, *id:*

> "Appellant, having complied with all the provisions of the statute, *acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission.* While the right thus acquired does not preclude the state from making similar valid grants to others, *it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit;* in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his *property rights.* The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law.
>
> "If the proviso dispensing with a showing of public necessity on the part of the Durant and similar companies is invalid as claimed, the foregoing principles afford a sufficient basis for the maintenance of the present suit, against not only the Durant Company, but the *members of the commission,* who threaten to issue a permit for the establishment of a *new* gin by that company without a *showing* of public necessity." (Italics supplied.)

In summary, the factual differences in the *Frost* case and the case at bar serve to emphasize the superior ground of the latter:

(1) In the *Frost* case, the discrimination was accomplished by statutory amendment. In the instant case, the regulation, having the force and effect of statute, is left

intact. The arbitrary discrimination is sought to be accomplished through outlandish interpretation and misuse of mere administrative power.

(2) In the *Frost* case the plaintiff had a mere franchise instead of a contract of lease containing the protecting regulation.

(3) In the *Frost* case the Constitution of the United States rendered illegal the proposed action of the governmental officer *even though authorized by statute*, while in the instant case the proposed action of the government officer finds no support in statute but, on the contrary, is rendered illegal by a regulation having the force of statute (see p. 26 *infra*.)

Nor have the *Tennessee Power* and *Alabama Power* cases, so heavily relied upon by petitioner, any relation to the wholly different factual and legal background of the present case. In *Tennessee Power* the Court was careful to point out that the whole difficulty with plaintiff's contention was that the competition complained of as not forbidden by any law or regulation aimed at the prevention of anarchic over-competition and over-production. The Court said:

> "The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. *If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution.* (Emphasis supplied) 306 U. S. at 139-140.

But the Court was careful to point out the two limiting principles within which the factual background of the present case falls. The first of these is: where the competition as such and in itself is forbidden by regulatory law aimed at preventing over-production, as here and in *Frost*, or preventing unfair competition, as in *Chicago Junction*, the legitimate competitor has a right to enjoin the acts threatening the prohibited competition. The second limiting principle, within which this case also falls, is that of *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, cited with approval by this Court in *Tennessee Power Company*, at 306 U. S. 139. This was a case where a municipality had plainly granted a properly restricted monopoly to a private water company for a period of 25 years. The contract with the city contained an express means by which the city might cancel the contract for failures of the water company, just as in the cases at bar, the regulation incorporated in the lease of Sheridan permits the allowance of needed competition. But the city had endeavored to cancel the contract and compete without having recourse to the means provided, and the Court properly struck this down.

Another case cited with approval in *Tennessee Power*, at the same page, is *Superior Water and Light Company* v. *Superior*, 263 U. S. 125, in which the State of Wisconsin was prevented from arbitrarily destroying a properly restricted private water monopoly similar to the one involved in *Walla Walla*, even where formal legislative action had been taken, unlike the mere arbitrary administrative interpretation present here. The Court struck this down as violative of the obligation of contracts, the Court pointing out the importance of the prior decisions construing the basic law involved contrary to the arbitrarily novel construction now attempted in language, *mutatis mutandis*, applicable to the case at bar.

> "None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred

construes the reservation in the State Constitution as having the extraordinary scope accorded to it below; and certainly in the absence of some very clear and definite pronouncement we cannot accept the view that it then had the meaning now attributed to it." 263 U. S. at 136.

B. Under Respondent's Status as a Member of a Limited and Regulated Class, Created to Prevent Anarchic Over-Competition.

Respondent has a second independent ground of legal standing to challenge illegal issuance of the Big Horn by virtue of its status of membership in a regulated class (Federal coal lessees). This status gives it a special interest, amounting to a proprietary right, created by a statutory regulation to prevent over-competition affecting members of the class.

This second ground rests on the *Chicago Junction* case (*Baltimore & Ohio R. R.* v. *United States*, 264 U. S. 258) and related cases, notably *Federal Communications Commission* v. *National Broadcasting Company* (KOA), 319 U. S. (1943).

In *Chicago Junction*, the Baltimore & Ohio Railway sought to enjoin a competitor, the New York Central, from acquiring certain terminal facilities. Mr. Justice Brandeis spoke for the court in holding that the B. & O. had a right, arising from a general provision of the Interstate Commerce Act forbidding acquisition of terminal railroads by a single line (here New York Central), unless such acquisition (ordinarily prohibited under the statute) was proved in the public interest. On allegation that there was no evidence to support the finding of the Interstate Commerce Commission that New York Central's acquisition was in the public interest, the Court held injunction should issue at the suit of B. & O.

The language of Mr. Justice Brandeis speaking for the Court in this situation is most illuminating:

> "The Transportation Act of 1920 . . . made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier unless authorized by the Commission. By reason of this legislation, the plaintiff's being competitors of the New York Central and users of the terminal railroads therefore neutral, have a special interest in the proposal to transfer the control of that company."

In the instant case there is a regulation having the force of law which forbids the issuance of the lease in question; aside from the fact that this regulation has been expressly made a part of respondent's lease, the regulation has the force and effect of statute, and confers the protection of special interest.

Here, too, we have a general negative rule with exceptions requiring definite findings. Any member of a regulated and restricted class of industry who is damaged by a violation of a regulation has a right to protect his special interest. In the *Chicago Junction* case, any member of the class affected by the Transportation Act, who was damaged by its violation, had a right to protection irrespective of the fact that the Transportation Act conferred no express rights upon the class. Such a right is necessarily implied from general language protecting the class.

It will be recalled that this Court, in *Federal Communications Commission* v. *NBC* (KOA), 319 U.S. 239, held that interference with a "clear channel" protected by the radio regulations and granted to plaintiff in a radio license, gave plaintiff an absolute right to be heard before the Commission, notwithstanding the fact that radio licenses confer no property right. In the situation here, respondent's lease and the terms and conditions thereof are plainly a property right, so that the factual difference serves to emphasize the correctness of the holding of the Court of Appeals that this case buttresses respondent's standing to sue. This Court said, of the *Sanders* case:

> "We pointed out that while a station license was not a property right, and while the Commission was not

> bound to give controlling weight to economic injury to an existing station consequent upon the issuance of a license to another, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission." 319 U. S. 247.

Again, as in the *Chicago Junction* case, *supra*, it was not the formal provision for judicial review which protected against wrongful competition, but rather the substantive statute (Federal Communications Act) which limited competition and thereby created a legal right against discriminatory allowance of "off-limits" competition.

So, too, does the *Sanders* case, cited, as we have just seen, with approval in the *KOA* case, underscore the right of Sheridan to sue in view of the superiority of the property right against wasteful and anarchic over-competition proposed by Sheridan here. For there, the regulatory law was not as it is here, primarily aimed at a situation of anarchic over-competition and intended for the protection of duly licensed competitors from the effect of anarchic over-production in a sick industry, but was aimed instead primarily at providing adequate radio broadcasting service to the public in a growing and prosperous industry.

In response to this showing of respondent's plain regulatory special interest and property right in the regulation, petitioner makes a double-barreled and doubly erroneous answer at pages 37 through 40. The main premise and the main error, however, is, as usual, petitioner's disingenuous and unsupportable assertion that the regulation was not designed as a regulation of the Public Lands Coal Industry for the purpose of preventing anarchic over-competition. Petitioner says, at page 39:

> "Here, there is no regulation of an industry . . . The regulation is based not upon any governmental power to regulate and to restrict competition in the field of public utilities but upon the authority of the United States as owner of the public domain."

As we have demonstrated *supra*, this assertion is entirely false. Moreover, it contrasts oddly with the repeated citation by petitioner, in defending the regulation in previous cases, of *Sunshine Anthracite Coal Company* v. *Adkins* and of the dissenting opinion in *Carter* v. *Carter Coal Company*, where this Court sustained the right of the federal government to prevent over-competition in the coal industry.

Petitioner's second effort to prevent enforcement of the regulation seeks to confuse the issue, whether respondent has a *special right* against anarchic over-competition, with the obvious fact that the Congress had no need to provide a *special forum* for review of decisions of the Bureau of Land Management. He impliedly urges that Congress, by its failure to provide a special forum, has implied that no private citizen should be able to enforce his property and status rights under the land and mineral laws of the United States. This overlooks history; and in the long and much litigated history of the Land Department and the Bureau of Land Management, efforts by various Secretaries of the Interior to depart from those land laws have been steadily turned aside by the courts *acting under their general equity powers*. (See pp. 79 through 84 hereof.)

Congress of course is aware that the courts have been adequately able to deal with such efforts under their normal equity powers in that time-honored line of cases.[39] Petitioner is thus actually urging that no property right and no right against arbitrary administrative discrimination can exist in the United States unless the Congress has chanced to provide special statutory review; he is saying that no rights exist under the laws of the United States except where the Congress has explicitly provided an unusual remedy. This court's recent decision in *Hynes* v. *Grimes Packing Co.*, *infra* p. 80 is a complete answer to petitioner on this point.

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[39] *Lane* v. *Hoglund*, 244 U.S. 175; *Work* v. *Mosier*, 261 U. S. 352, 360; *Santa Fe Pacific R.* v. *Fall*, 259 U.S. 197, to mention only a few.

The principle applied by this Court in *Scripps-Howard Radio* v. *Federal Communications Commission* seems entirely applicable:

> "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402 (b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." 316 U.S. 4, at 11.

Petitioner would ignore that in the *Frost* case, the *Chicago Junction* case, and the radio cases, this Court was first looking to determine whether a special right of the plaintiff greater than those of a mere taxpayer had been invaded, and only then was looking to the secondary question of whether injunction, mandamus or special statutory review provisions were the proper remedy; and more important, he overlooks that the Constitution itself prevents the Congress from removing the inherent power of the courts to protect property of citizens from arbitrary abuses of power by governmental officers.

IV. VIOLATION OF THE LAND LAW IS UNLAWFUL AS A PERSONAL ABUSE OF POWER AND DISREGARD OF DUTY.

A. Violation of the Statutory Regulation, as an Assault on Respondent's Status as a Member of the Limited and Regulated Class of Federal Coal Lessees, is an Unlawful Personal Abuse of Power and Disregard of Duty.

1. Violation would amount to illegal discrimination and petitioner's "construction" would violate due process.

As a member of a specially regulated and limited class, respondent cannot lawfully suffer the discrimination involved in petitioner's attempt to grant Big Horn the

special favor and privilege of exemption from Reg. 193.3. He would do this by now continuing it to deny its heretofore uniform interpretation. (See *supra*, III B, p. 58.) The construction which petition now "seeks" for the regulation (i.e., "discretion" to ignore it and refuse to apply it) would violate both the substantive and procedural due process requirement of the 5th Amendment.—*United States ex rel.* v. *Dunton*, 288 Fed. 795 (S. D. N. Y. 1923) *supra* 38.

While, of course, the equal protection clause of the Fourteenth Amendment is not specifically a part of the Fifth Amendment, rank *administrative* discrimination without a reasonable basis of classification is violative of the basic requirements of justice and fair play of the due process clause of the Fifth Amendment.[40] *Nield* v. *District of Columbia*, 71 App. D. C. 306, 110 F. (2d) 246; *O'Connor* v. *District of Columbia*, 153 F. (2d) 225, 80 App. D. C. 351; *Lappin* v. *District of Columbia*, 22 App. D. C. 68.

In *Hamilton National Bank* v. *District of Columbia*, 156 F. (2d) 843 (1946), the Assessor of the District of Columbia had interpreted a statute applying a lower rate of tax to savings banks as being applicable only to banks incorporated under state laws and not to those incorporated by acts of Congress. In other words, he had interpreted this term "savings bank" to mean "bank incorporated under state laws". The Hamilton National Bank, being incorporated by an act of Congress, was assessed at the higher rate applicable to non-savings banks. That Court held this administrative interpretation invalid in the following language:

> "The next question is whether the administrative action is so improper as to be invalid. The equal protection clause of the Fourteenth Amendment does not apply, that Amendment being directed to the states. The Fifth Amendment, of course, does apply, but it contains no equal-protection clause. *The Supreme Court has held as settled that a federal statute passed under the taxing*

[40] The 5th Amendment, Federal Constitution provides that: "No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

power may be so arbitrary and capricious as to cause it to fall before the due-process clause, and has intimated that discrimination, if gross enough, might invalidate an act of Congress as equivalent to confiscation and therefore void under the Fifth Amendment. *But we are not considering the validity of an act of Congress and need not go into the question whether Congress itself could provide a differential in tax for savings banks and in the same enactment define a savings bank as a bank with a state charter.* The matter before us is the validity of an administrative action, and the *scope of the power of classification by an administrator under a statute is obviously much less broad than is the power of Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which 'operates to create a rule out of harmony with the statute, is a mere nullity.'* We do not think that an administrative officer can restrict a statutory term such as 'incorporated savings bank' by a definition having no relation to savings deposits or accounts. *He cannot eliminate, by administrative definitions, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition.* His attempt to do so is invalid as not in harmony with the statute. *While, as we have said, the equal-protection clause does not apply here, the course followed by the Supreme Court in disposing of cases wherein administrative action has been held invalid because of that clause, furnishes a guide for our action here.*" (Italics supplied.)

In the case at bar, just as in the *Hamilton National Bank* case, *supra,* Regulation 193.3. (having, as we have shown, the force and effect of a statute) requires a showing of *consumer need which cannot otherwise reasonably be met.* The petitioner, acting in his administrative capacity and not under his delegation of legislative power, has endeavored to interpret "*possibility that both mines can exist*" as equivalent. This interpretation in favor of illegal competition by the Big Horn Coal Company is so rank a discrimination against the respondent that just as in

the Hamilton Bank Case it is invalid because it violates the fundamentals of justice and due process embodied in the Fifth Amendment. An officer cannot ignore the law and refuse to apply it.

In the instant case, the petitioner (then Under Secretary Chapman) has not even attempted to mask his discrimination, but reveal it, by the following three admissions:

(1) It is admitted in the first administrative decision that they will not apply the criteria of Regulation 193.3 in the instant case (R. 60).

> "In the instant case the usual criteria for determining need for a new mine under Section 193.3 do not apply . . ."

(2) It is admitted that no exception to the law of 193.3 is to be made in the future (R. 69).

> "It is also suggested that the Department's interpretation of the Regulation in its decision of July 29, 1947, will encourage evasion of the Regulation by those who will seek to extend their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn. The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal reserves."

The quote indicates that the petitioner is saying the larger the violation the more reason to allow it as an exception to the Regulation.

(3) ***They admit no exceptions to the rule of Regulation*** 193.3 ***was made in any of the previous cases which have ever arisen under the Regulation throughout its entire existence,*** inasmuch as petitioner has conceded that the two Olson and one Cox case represent all of the 40-odd published and unpublished cases which have arisen under the Regulation 193.3, F. C. R. 43,

in the Department, throughout its entire existence. (R.(c) 51)[41]

In short, an exception to the law is to be made in this one case for the great and powerful on the mere ground of bigness and strength although no exception has been made in the past and none is contemplated in the future for the small and the weak. In other words, the law is to be interpreted one way for the great and the powerful in just this one case, and another way for the small and the weak in all other cases.

As applied to the instant case, this discrimination operates in two ways against the respondent.

First, respondent like every other applicant has been required since 1934 to meet the criterion of Regulation 193,3 and to do so subsequently each time that respondent applied for a Federal lease, whereas an exception is made for the Big Horn Coal Company so it need not meet the criterion of the Regulation. Respondent will prove at trial, in support of its alleged prior construction, that the Geological Survey automatically conducts a market investigation to decide the issue of market need on all applications.

Second, petitioner has protected the other and often superior competitors of respondent against unneeded competition in each and every of the forty odd times a lease application has been contested under Regulation 193.3 in the past, by applying the criterion of the Regulation, yet he refuses to protect the respondent by applying the same criterion to Big Horn.

2. Retroactive informal "repeal" by interpretation is illegal after reenactment of the Mineral Leasing Act and reliance upon a regulation thereof.

As a member of a specially regulated class respondent has a legal right to prevent impairment of its investment

[41] At the hearing in chambers on November 28, 1947, before that court it was necessary for petitioners to concede that these three most recent 193.3 cases represent the heretofore uniform administrative interpretation of all the departmental cases (both published and unpublished) on this subject.

made in reliance upon a regulation. Petitioner cannot retroactively "repeal," by mere abortive administrative interpretation, that same regulation which he has not even attempted formally to repeal, especially when the present Mineral Leasing Act has been repeatedly reenacted since issuance of the Regulation.

Even if it be assumed that the petitioner, in the case at bar, has endeavored to exercise his legislative power delegated by the Congress under the Mineral Leasing Act (in the face of his repeated statements that the regulation is still in full force and effect, although he will not apply it here) then his action is void. The Mineral Leasing Act has been repeatedly amended since Regulation 193.3 was promulgated in 1934 including:

> The Amendment of August 8, 1946, c. 916, §1 through 13, inc., 60 Stat; the Amendment of July 13, 1946, c. 574, 60 Stat. 533; The Amendment of June 13, 1944, c. 244, 58 Stat. 275; and the Act of Nov. 28, 1943, c. 329, 57 Stat. 593.

The effect of these repeated reenactments of the Secretary's authority, without any change in the instant regulation, have the effect of freezing the regulation into the law of the land and making it impossible for the Secretary of the Interior to repeal the regulation retroactively as it affects respondent's investment.[42] *R. J. Reynolds Tobacco Co.* v. *Helvering*, 306 U.S. 110 (1939); *Helvering* v. *Griffiths*, 318 U.S. 371 (1943). In the *Reynolds* case, the Reynolds Tobacco Company, relying on a long-standing Treasury regulation and the interpretation thereof (to the effect that the profits of the company in dealing in its own shares were non-taxable) had successfully dealt in its own shares and reported the profits as non-taxable income. The Commissioner of Internal Revenue had purported to repeal this regulation both retroactively and prospectively. The Supreme Court held that the proposed retroactive appli-

[42] It should be noted that this proposition is entirely unnecessary to the correctness of the Court of Appeals' opinion.

cation of the new regulation to Reynolds' profit was invalid.

> "Since *the legislative approval of the existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law*, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed." 306 U.S. at 116 (italics supplied).

Here, the Sheridan Wyoming Coal Company has relied upon the Regulation to the extent of making heavy and continuous investment in the latest mining equipment so that additional ground is present for denying the secretary power to repeal the regulation. To do so would be a retroactive alteration of the entire background of law upon which respondent was entitled to rely and has relied in making substantial investment; and this is in the face of repeated reenactment by Congress of the Mineral Leasing Act with this regulation in full force and effect. The effect upon the entire Federal mining industry, and on respondent in particular, is a disruption of their entire legal background, similar to that described by the Supreme Court in *Helvering* v. *Griffiths*, *supra*, where dividends of stock of like kind had been made for years in reliance on the settled administrative regulations to the effect that such dividends did not constitute taxable income when received. The Court said:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the Congressional proceedings and debates, his understanding of non-taxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations

of the Treasury to advise that no such liability existed." 318 U.S. 402.

So here the petitioner is attempting to depart from a regulation which in some forty decisions within the Department had been uniformly enforced to prevent the issuance of leases of the type here in question; the Congress has repeatedly reenacted the Mineral Leasing Act under the authority of which the regulation was promulgated; the petitioner and his predecessors have caused the regulation to be promulgated in the place provided by the Congress for regulations having general legal effect; and yet this Court is asked to rule that the regulation may be retroactively repealed or ignored at the whim and caprice of one man; and that without even an express acknowledgment but, on the contrary, with an express denial that he is repealing it.

The *Germania Iron* case, discussed and quoted at p. 36 *supra*, and totally ignored by petitioner in his brief, has eloquently described the outrage a citizen feels when a governmental officer claims a right to disregard the laws, their uniform prior interpretation, and the uniform long-standing practice of the Public Land Department, under which the citizen has acquired property rights in order to make a single arbitrary discrimination. Nowhere is the rule of *stare decisis* so rightfully dear to the law as in rules affecting land.

3. The land has been withdrawn for the protection of respondent's class.

As a lawful member of a specially limited and regulated class, respondent is entitled to prevent the illegal use of land withdrawn from the public domain for the express purpose of protecting the said class.

(a) *The lands which petitioner proposed to lease have been validly withdrawn from the public domain under the non-statutory authority exercised by the Executive Department some fourteen years ago.*

The public lands which the petitioner imminently threatens to lease have been long withdrawn for a broad public purpose (i.e., preventing chaos in the western public lands coal industry). The Land Department evidenced this in the excerpted letters of the Secretary of the Interior dated January 24, 1947. (Amended Complaint, Exhibits A and B, R. 57, 58). The *Olson* and *Cox* decisions also set forth the broad public policy which the Executive Department sought to enforce. It is to be noted that the first document refers to *U. S. ex rel McLennon* v. *Wilbur*, 283 U.S. 414. Withdrawal power is referred to and relied upon in connection with the action taken by Secretary Ickes. It is significant that the withdrawal exercised in the *McLennon* case was connected to the Mineral Leasing Act which construction applied to 30 U.S.C. Sec. 201 with equal force (i.e., coal as well as oil).

United States v. *Midwest Oil Company*, 236 U.S. 459 adequately defines and elucidates this principle and the power of the Secretary of the Interior to exercise the withdrawal power informally as he did fourteen years ago in this matter. Also *Stockley* v. *United States*, 271 F. 632.

This policy has had the fourteen-year acquiescence and approval of (1) the head of the Executive Department and (2) the Congress of the United States. *United States* v. *Midwest Oil Co., supra.*

The questioned leases should not issue by reason of non-statutory withdrawal.

(b) *The public lands in question have been effectively withdrawn by the Executive Department under the statutory authority of 43 U.S.C.A. 141 et seq.*

Under 43 US.C. § 141, the Executive is expressly granted power to withdraw public lands for a public purpose upon proper description of the purpose. It has been held in *Stockley* v. *United States, supra*, that the Secretary of the Interior has the power to exercise this authority. The terms of the two letters of withdrawal, Exhibits A and B

of the Complaint, meet the requisites of the statute. This action in addition to being aided by publication of Regulation 193.3, was also aided by the long standing acquiescence of both the head of the Executive Department and the Legislative Department of the Government. This action constituted an effective statutory withdrawal.

(c) *The allegation that the land had been withdrawn should have been assumed on motion to dismiss and motion for leave to amend.*

Although the complaint alleged that the lands in question had been validly withdrawn from the public domain and had not been restored thereto the District Court, originally without granting to respondent the right to produce any facts which he might have to show the land had been withdrawn, dismissed the complaint. This was erroneous. *Tahir Erk* v. *Glenn Martin Company*, 116 F. (2d) 865.

B. Violation of the Regulation, as a Legal Wrong to Respondent's Property Rights Under Its Contract of Lease, is Likewise An Unlawful Disregard of Statutory Duty.

Due to respondent's property rights under its lease, violation of Regulation 193.3 is illegal on several independent grounds as follows:

1. The regulation is a term of respondent's leases under Paragraph One.

Respondent, due to its property rights under its contract of lease, is entitled to prevent petitioner's threatened action as illegal because the Mineral Leasing Act is an *express* term of paragraph 1 of the lease and Regulation 193.3 has become part of that Act. (See *supra* 29)

Paragraph One of the lease itself specifically provides:

> "This indenture of lease (is) entered into . . . under, pursuant, and subject to the terms and the provisions

of the Act of Congress, approved February 25, 1920 (41 Stat. 437), entitled 'An Act to Promote the Mining of Coal, Phosphate, etc.'" (Mineral Leasing Act of 1920). (Amended Complaint Ex. J, R. 77)

Chapter 85, Section 32 of this Act (41 Stat. 450, 30 U.S.C. 189) provides that:

> "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to carry out and accomplish the purpose of Sections 191-194, 201, 202-208, 211-214, 223-229, 241, 251 and 261-263 of this title." (The Mineral Leasing Act of 1920).

Regulations 193.3 was promulgated under this section of the Mineral Leasing Act in 1934. At the time of the execution of this lease the regulation had been in full force and effect for 9 years.

Therefore, the specific incorporation of the Mineral Leasing Act into the lease included incorporation of all regulations promulgated thereunder including 193.3. They became part of the Act by the required promulgation.

Argument of the point that a regulation issued under a statute necessarily becomes a part of that statute is set forth at pages 43-46 hereof.

2. The regulation is a term of respondent's lease under Paragraph Six.

Respondent, due to its property rights under its contract of lease, is entitled to prevent petitioner's threatened action as illegal because Reg. 193.3 is an *implied* term of paragraph 6 thereof.

1. The respondent Sheridan-Wyoming's coal lease dated September 20, 1943, provides at Section 6, page 4, as follows:

> "It is further *mutually* understood and agreed as follows . . . (6d) if the lessee shall fail to comply with the provisions of the act or make default in perform-

ance or observance of any of the terms, covenants, and stipulations hereof, or the *general regulations promulgated and enforced at date hereof*, the lessor may institute appropriate proceedings in a court of competent jurisdiction for the forfeiture and cancellation of this lease provided in Section 31 of the act, but this provision shall not be construed as depriving the lessor of any legal or equitable remedy which the lessor might *otherwise have*." (Italics supplied.) (Amended Complaint, Ex. J, R. 83).

This provision by necessary implication incorporates the terms of the aforementioned Regulation 193.3 which, of course, was in force on the lease date. Such a specific reference to lessor's Regulations, even though directed to binding the lessee, must, in simple fairness, bind lessor as well on principles of mutuality of obligation in equity and certainly it reinforces the applicability of the doctrine of incorporation (of relevant laws) by operation of law. (See *infra*, p. 76)

3. Estoppel has arisen from reliance on uniform practice and usage.

Respondent, due to property rights under its contract of lease is entitled to prevent petitioner's threatened action as illegal. Petitioner's long continued custom, practice, and usage of enforcing Regulation 193.3 in the interest of his lessees estop petitioner from asserting that Reg. 193.3 is not a part of the contract of lease. Respondent has relied thereon. (Amended Complaint, par. 1(f), R. 52)

By his long established and uniform custom, practice and usage, of requiring that need be shown before he would grant a Federal coal lease, petitioner led respondent to believe that no coal lease would be granted for an unneeded mine.

Appellant was justified in relying upon this practice, since it was equally sound from the pecuniary standpoint of either party. Imagination is trained to picture a situation where the Regulation would not serve the best interests of the coal industry, the consumer, and the nation. If more

mines are needed, they are authorized; if unneeded, they are foresworn as wasteful. Moreover, the unchanging wisdom of the law has sustained the test of time. The Regulation, and its uniform interpretation, had been consistently and uniformly applied by petitioner and his predecessors since 1934 except in this single case. (See *supra*, p. 30)

Respondent, in reliance upon this sound practice, has made substantial investment over and above that required by the terms of the lease. (Amended Complaint, R. 52) Petitioner has acquiesced and reaped benefit. Thus, not only was the previous sound practice part of the consideration for respondent's investment pursuant to the contract but the same practice served as the inducement for additional voluntary investment from which petitioner has profited in the form of increased production and royalties.

Respondent's change of position has thus doubly benefited the petitioner. Estoppel, therefore, prevents alteration of the representation. Grave prejudice to respondent —i.e., having its entire business imperilled—would otherwise result.

There is a marked and obvious inconsistency between petitioner's present claim—that Reg. 193.3 means nothing; that it does not bind him, that the parties in this suit are in the same position as if it never existed—and his previous language and conduct according it the force of a statute *precluding* his issuance of any lease for an unneeded mine. (*Olson* case, R. 75) He had always represented to respondent and to the entire world by his published and widely broadcast regulations and departmental decisions that he could not grant a lease for an unneeded mine. He now makes exactly the opposite contention; that he can grant a lease to unneeded mine at his whim by inflating his discretion to cover areas he had himself previously held non-discretionary and said he was "precluded" from disturbing.

In sum, petitioner represented the Regulation was law forbidding unneeded mines. Respondent was justified in

relying, and did rely thereon, in making large investments and expenditures beyond those required by his lease; as well as in making the lease and the expenditures thereby required. Petitioner cannot now be heard to change his position.

It has long been held that the purpose of equitable estoppel is to prevent a party from denying the truth or accuracy of that which he had previously asserted, or from *assuming a position which is inconsistent with that which he had previously taken.* In other words the rule is that equitable estoppel arises where a party has been induced to alter his position, by a representation of the other, in such a way that the first party would be injured if the other party is not held to his previous representation.

In answer, petitioner asserts the circular proposition "The United States is neither bound nor estopped by the unauthorized acts of its agents in dealing with its property". Certainly, since the United States can only act by agent, it must be bound by the authorized acts of its agents; and as we have shown *supra* 43, Secretary Ickes and his successors were fully authorized to make the regulation and to adopt its uniform prior construction. The cases cited by petitioner (Pet. Br. 42) are rejections of claimed estoppels *where the government agent acted in the teeth of his authorizing statute.* In *Utah Power*[43], private oral agreements contrary to statute were claimed. In *United States* v. *San Francisco*[44], "toleration" of a practice contrary to statute was proved. These the Court properly rejected as faulty estoppels, in suits by the United States to prevent the violation of its laws, saying "the United States is neither bound nor estopped by acts of its officers in entering into an arrangement or agreement to do or cause to be done *what the law does not sanction or permit.*" 243 U.S. at 409, 310 U.S at 32. (Emphasis supplied)

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[43] *Utah Power & Light* v. *United States*, 243 U.S. 389, 409.

[44] 310 U.S. 16, 31-32.

But this is a far cry from saying that the agent of the government can not become equitably bound to an authorized, uniform and reasonable construction of a statute, and barred by equity from making an arbitrary departure therefrom. Cf. *R. J. Reynolds* v. *Helvering supra*, p. 67; *Work* v. *Frasier, supra*, p. 49; *Work* v. *McAlester, supra*, p. 49; *Germania Iron Co.* v. *James, supra*, p. 36.

4. Regulation 193.3 is incorporated into the respondent's lease by operation of law.

Respondent, due to its property rights under its contract of lease, is entitled to prevent petitioner's threatened action as illegal because Reg. 193.3 is a term of the lease by operation of law.

In 1934, Regulation 193.3 was issued pursuant to a delegation of legislative power to the Secretary of the Interior by the Mineral Leasing Act of 1920. It is still in full force and effect. Respondent's lease was made in 1943, a successor to previous Federal leases. (Amended Complaint, par. I(d), R. 51)

It has been settled law for generations that:

> "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."
> *Wood* v. *Lovett*, 313 U. S. 362 at 370
> *Walker* v. *Whitehead*, 83 U. S. 314
> *Antoni* v. *Greenhow*, 107 U. S. 769

In *Wood* v. *Lovett, supra*, a situation existed virtually on all fours with the present one. A 1935 Arkansas statute, in effect at the time of a tax sale, provided that the buyer's titles should be free from defects arising from technical errors in the forfeiture proceedings. The state's tax deed was quitclaim in form and made no reference to the statute; the state subsequently repealed the statute; and a former owner contended that the Act of 1935 was not a term of the tax deed from the state. The Supreme Court

held that the Act was a term of the deed by operation of law, just "as if expressly referred to or incorporated in its terms."

So, in the present case, the Regulation, having the force of statute, is a term of respondent's lease by operation of law. Moreover, here there are two important further facts in respondent's favor: The lease expressly is issued "pursuant and subject to the Mineral Leasing Act"—the parent of the Regulation, and of which the Regulation has become a part, by promulgation in the Federal Register, and by repeated reenactment of the parent. See *supra*, 66; and no repeal of the Regulation has even been attempted.

In reply to this showing, petitioner (Pet. Br. 34, 35) says that *Wood* v. *Lovett* depends upon an intent of the state to make an "offer" to purchasers at tax sales; and laboriously constructs a theory that there was no such intent on the part of Secretary Ickes to make an offer to prospective Federal coal lessees of protection from the ills of anarchic over-production. Yet it was those ills and that anarchy which Ickes and his successors have so eloquently described as their reason for establishing and continuing the regulation. It seems obvious that this security to lessees was one of the major purposes of the regulation and a certain result of its enforcement (see *supra* 30).

To support his untenable position, petitioner has recourse to another of his many inapplicable cases in which a citizen has claim that a *repealed* statute was *irrevocable* as a contract of the state.[43] It is again necessary to reiterate that the Secretary of the Interior has not attempted to repeal this regulation. The issue is simply whether he may violate it in his administrative capacity while it remains in force. Petitioner makes an extensive quotation from the Wisconsin case which clearly shows that this Court was respecting the powers of the *legislature* to

[43] *Wisconsin and Michigan Railway Company* v. *Powers*, 191 U.S. 379, Pet. Br. p. 35.

formally repeal the tax exemption statute; which exemption did not depend upon any direct bargain with the state. Such a direct bargain as the lease is here involved, like the purchase involved in *Wood*. The amended complaint recites that respondent bargained for the protection of the regulation. (Amended Complaint, First (g) R. 52)

Of course petitioner's reiterated contention (Pet. Br. p. 37) that the Court of Appeals' opinion requires the result that the regulation can never be repealed remains absurd. Neither Congress nor the Secretary of Interior have attempted repeal. Respondent has never meant to contend and does not now contend that Congress repeal the regulation. Even the question whether the Secretary can formally repeal is not involved. All the Court of Appeals held is that petitioners cannot "intolerably" and ruinously discriminate against respondent by refusing to enforce the regulation in its behalf while enforcing it in all other cases (See *supra* 46).

5. The withdrawal in support of the Regulation is incorporated in the lease by operation of law.

Respondent as a party to its contract of lease is entitled to prevent petitioner's threatened action because the withdrawal letters forbidding it are a term of the lease.

The arguments supporting this point have already been set forth under points A(3) and B(4) *supra*, covering regulatory withdrawal and incorporation by operation of law, at pages 69 and 76 hereof.

V. RESPONDENT SEEKS ONLY TO PROTECT ITS OWN LEASEHOLD PROPERTY AND LAWFUL STATUS AGAINST PETITIONER'S PERSONAL ABUSE OF UNAUTHORIZED POWER AND DISREGARD OF DUTY: THE UNITED STATES HAS NO INTEREST.

Petitioner prefaces his erroneous claim that this is a suit against the United States by remarking that the opinion of the Court of Appeals did not specifically comment[46] upon it (Pet. Br. 45). It is manifest from the record that there was no necessity for the Appellate Court doing so, both because of the District Court's original holding (R. 9, 30) and the Appelate Court's thorough discussion of respondent's standing to sue (R. 105, 106). The Court of Appeals did not have to reverse the District Court upon that point. As petitioner admits (Pet. Br. 45), the District Court at the very outset, when the matter was before Judge Holtzoff, decided in its conclusions of law (No. 5, R 30) that:

> "The United States is not a necessary party to this action."

During oral argument, the District Court, by Judge Holtzoff, in rejecting the petitioner's contrary contention, correctly stated:

> "It has been held time and time again that an action to enjoin a government officer against exceeding his authority is not a suit against the United States." (R. 9)

Indeed, the names of numerous Secretaries of the Interior appearing in the captions of a long line of personal suits against them, demonstrate that they, above all other government officers, should be well aware that personal suit is the proper remedy to prevent them from exceeding or acting contrary to their statutory authority under the

[46] The court also viewed discussion of sovereign community entirely unnecessary where a government officer was sued personally to prevent him from exceeding his statutory authority, in a recent Interior Department case, *Hynes v. Grimes Co.*, 93 L. ed. (adv.) 965 (1949). There at page 52 of the petitioning officer's brief he made the same claim as here: "The waters involved are the property of Federal Government." (Pet. Br. Oct. Term, No. 24.)

public land laws. Classic among cases where government officers have been judiciously prevented from exceeding their authority are: *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390; *Pennoyer* v. *McConnaughy* 140 U. S. 1; *Scully* v. *Bird*, 209 U. S. 481; *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Payne* v. *Central Pac. R. Co.*, 255 U. S. 288; *Santa Fe Pac. R. Co.* v. *Fall*, 259 U. S. 197; *Work* v. *Louisiana*, 269 U. S. 250; *Hynes* v. *Grimes Packing Co.*, *supra*.

Next petitioner premises his entire argument on this point upon a misapprehension of the facts of this case and a consequent misapplication of numerous cases which have no bearing here.

After reciting that the United States owns the lands which petitioner is so eagerly anxious to lease to Big Horn, he dedicates himself to the proposition that:

> "A proceeding *against property* in which the United States has an interest is a suit against the United States". (Emphasis supplied)

He would thus convert respondent's defense of its own conceded leasehold property rights into an attack by respondent upon the title or interest of the United States in the public coal lands which the petitioner seeks to lease in violation of its laws.

It is self-evident from the complaint and prayer for relief (R. 51, 56) that respondent is neither "proceeding against property" nor atempting to establish any title or interest in all the unleased public lands, but only to prevent the petitioner from this lawless leasing in defiance of the statutes and regulations of the United States[47] which

[47] The recent *Hynes* decision, *supra*, struck down the attempt of an Interior Department officer to exceed his statutory authority under a void regulation. There the citizen's fishing business would have been irreparably injured by the officer's threatened action in controlling fishing waters (which concededly belonged to the United States) in such a way as to damage the fishing company. Neither the majority nor the minority opinions mentioned the far-fetched proposition that the fishing company was asserting an interest in the fishing waters of the sovereign United States by seeking relief against an officer personally who threatened to control the waters of the United States in a way which conflicted with its statutes.

control that land for the benefit of all the people, and for the benefit of the public lands coal industry in particular, not for the special privilege of Big Horn.

Respondent asserts no interest in the unleased lands of the United States; on the contrary, it asserts only its right to the full value of its own leasehold property. Respondent firmly believes that petitioner has no more right to use the public lands to destroy or diminish the value of respondent's leasehold property in violation of the laws of the United States, than petitioner would have a right to explode dynamite belonging to the government on adjacent government property, in such a way as to cave in respondent's mines, where that was forbidden by a necessary term of the mining lease.

Respondent solely endeavors to protect its rights as owner of its own lease and business against threatened action by petitioner legally established as wasteful, harmful and anarchic by the very land law from which petitioner derives all his authority, and, at the same time, derives *his definite negative duty in the premises*. It is not the Sheridan-Wyoming Coal Company that stops petitioner in his determined effort to violate these laws, but those very laws themselves.

Petitioner's argument reduced to its fallacious logic would mean that a citizen, despite either law or contract forbidding it, could never sue a government officer personally where his wrong contemplated the use of property of the United States in a way forbidden by the laws of the United States. Petitioner's fundamental logical difficulty is that he does not seem to realize that it is the coal-leasing laws of the United States which prevent his issuance of the questioned leases to Big Horn. He seems to think that he can quietly avoid discussion of the fact the land laws forbid him by erroneously attributing to respondent a claim of interest in all the public lands of the United States, which respondent has never made.

But the simple truth is far different. "Sic utere tuo ut alienum non laedas". Respondent is merely seeking protection of respondent's own property and business,

some of it acquired and existing, it is true, by contract of lease. Yet, nevertheless, the lease is respondent's own long-held property just as much as if held under some more permanent title, or acquired from someone else. Petitioner nowhere dares frankly and openly claim any ownership or interest for the United States in respondent's own leasehold during its term. Yet he would reach the same result and cloak himself in sovereign immunity to destroy the value of that lease (or at least of "one of its most valuable provisions"), by illegal, arbitrary and capricious action in the teeth of the land laws granting him his authority and establishing his duties.

Petitioner's next proposition (Pet. Br. 46) is:

> "That suit for *specific enforcement* of rights *to secure Governmental property* alleged to have arisen from contracts constitutes suits against the United States". (Emphasis supplied)

But nowhere does respondent seek "to secure government property" or proceed against it. Indeed, petitioner does not attempt to point out specifically where any governmental property is being sought by the respondent. He is content merely to imply such by the citation of inapplicable cases where that question was involved. Petitioner's next proposition (Pet. Br. 46, 47) is a gratuitous assertion that the wholly negative relief sought by the respondent against the person of the petitioner is somehow the equivalent of a suit compelling specific performance and mandatory relief from the sovereign United States.

For this he cites an enormous quantum of cases which have no application here. An examination of them will show that they stand for the proposition that mandatory relief and positive action cannot be compelled from the United States. All of these cases carry their own distinguishing limitation with respect to the class of cases referred to *supra*, where purely negative relief is enforced personally against a government officer exceeding his statutory authority. For instance, in the cases which petitioner cites, *Goldberg* v. *Daniels* requested compulsion of the

acceptance of an offer of contract upon the sovereign. *Wells* v. *Roper* sought continued acceptance of services upon the sovereign, which it may also be noted was entirely compensable in the Court of Claims. *Mine Safety Company* v. *Forrestal* sought to compel the payment of moneys out of the sovereign's treasury, although in form it was a negative challenge to the government's authority to set off renegotiation deductions. All of the other cases cited by petitioner contain similar qualifications to the effect that where no positive action (i.e. perforce) is sought to be compelled out of the soveriegn and where a government officer is invading property rights without or contrary to statutory authority and duties, the United States is not an indispensable party. Indeed is it physically impossible to compel specific performance of a negative act and where the negative relief is actually that alone, as here rather than compelling a positive act thru a prayer that is negative in form only, it is likewise physically impossible to have any specific perforce.

The recent majority opinion in *Larson*[48] cited by petitioner was most careful to distinguish from its doctrine that class of cases where injunction is sought against a government officer personally to prevent from acting in excess of his valid authority or contrary to his plain statutory duty (referred to *supra*, p. 80). The minority not only agreed with the doctrine of the cases distinguished but saw their application to the facts of *Larson*. In *Larson*, Chief Justice Vinson, for the majority, said (p. 6, pamph. op.):

> "*Where the officer's powers are limited by statute, his actions beyound these limitations are considered individual and not sovereign actions.* The officer is not doing the business which the sovereign has empowered him to do, or he is doing it in way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note in such cases the relief can be granted, without impeding the sovereign, only because of the officer's lack of delegated power." (Emphasis supplied)

[48] *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682.

The Chief Justice also quoted with approval from the *Stimson* case (at p. 7, pamph. op.); he said:

> "The rule was stated by Mr. Justice Hughes in *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 620 (1912), where he said '* * * in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments [citing cases] and it is equally applicable to a *Federal officer acting in excess of his authority* or under an authority not validly conferred.'." (Emphasis supplied)

The Chief Justice then went on to point out (p. 8, pamph. op.) that in *Larson* it was:

> "not contended by the respondent that the present case falls within either of these categories."

The Chief Justice went on to specifically limit the doctrine of the *Larson* case (p. 12, pamph. op.) in the following specific terms:

> "We hold that if the actions of an officer *do not conflict with the terms of his valid statutory authority*, then they are the actions of the sovereign, whether or not they are tortious *under general law*, if they be regarded as the actions of a private principal under the normal rules of agency." (Emphasis supplied)

Thus petitioner's threatened action, revealed as his own personal lawless act, in the teeth of the very law conferring his powers and duties, is plainly forbidden by the both the majority and minority views of the necessary limits of sovereign immunity expressed in this Court's latest and exhaustive review of that problem in *Larson* v. *Domestic and Foreign Corporation*, 337 U. S. 683.

In turn, there is *not one single action* that the United States would be required to take by the granting of the relief here requested. (R. 56). The only action that petitioner personally would be prohibited from taking would be a lawless disposition of the lands of the United

States, just as Secretary Fall and numerous other Secretaries of the Interior have been prohibited in the past.

After granting of the relief sought here, the public lands of the United States would remain freely disposable by petitioner *in accordance with the leasing laws of the United States*, just as they have always been. Never have the public lands been disposable at any unlawful and limitless discretion to grant special privileges and exemption from law to Big Horn merely because of its considerable size, "a large going concern" (R. 62). It has always been required that the public lands be leased and otherwise disposed of for the benefit of *all* the people, not the special privilege of the mighty.

Suppose petitioner arbitrarily decided to lease a range for private testing of explosives on public land adjoining Sheridan's tipple. He would doubtless then urge that an injunction against such action, certain to destroy Sheridan's tipple, was a claim of an interest in lands of the United States; he would say respondent claimed a "negative easement"; he would say Sheridan was restricting the use of lands and explosives owned by the United States; he would say Sheridan claimed specific performance of a contract of the United States not to blow up respondent's property; he would say Sheridan was depriving the United States of the rental.

VI. CONTRARY TO PETITIONER'S ASSERTION, THE COURT OF APPEALS COMMITTED NO ERROR BY INDICATING CONTINUANCE OF THE DISTRICT COURT'S PRIOR TEMPORARY RESTRAINT; THIS WAS NECESSARY TO THE PROTECTION OF ITS APPELLATE JURISDICTION.

Petitioner insists upon importing an extreme construction into the plain if abbreviated and informal language of the Court of Appeals' *opinion* on the subject of temporary restraint. The gist of petitioner's charge (Pet. Br. 55-63) is that the appellate court in its opinion indicated

that it intended, upon issuance of its mandate, to direct therein that the District Court convert its prior temporary restraint into the equivalent of a statutory preliminary injunction without the hearing and the findings necessary to the latter under Rule 65 FRCP. There are two fundamental errors in petitioner's attack.

First, a full quotation of the language used by the Court of Appeals and full quotation of the language of the District Court's temporary order referred to by the Court of Appeals, shows plainly that the Court of Appeals intended only to protect its forthcoming mandate ordering amendment of the complaint in the District Court.

Second, if the petitioner has any doubt whatever of what the Court of Appeals intends to do when it issues its mandate, he can obtain clarification from that court. *The mandate has not issued as yet.* It has been stayed by the Court of Appeals, on the motion of the petitioner, pending review here in the Supreme Court. It is impossible for anyone to predict the exact form of that mandate until it is issued. The speculations and dire predictions of petitioner are not only premature, but out of time and order, because he has made no move to avail himself of the remedy which he obviously has for his fancied injury which has not even occurred as yet.

The plain language of the District Court's temporary order and the plain language of the Court of Appeal's opinion referring to it, furnished no basis for petitioner's misapprehensions and dire predictions as the record clearly shows. The following points are very clear:

1. After the first appeal the only questions before the District Court were a motion to amend the complaint and a companion motion for preliminary injunction (R. 87).

2. The District Court on June 4, 1948 entered a temporary restraining order and injunction to protect jurisdiction until the dispositions of these motions (R. 108, 109).

3. The District Court order of July 6 1948 overruled both motions, but continued the temporary injunction for ten days in order to protect an orderly review of its action (R. 87). This same temporary order of the District Court was later continued pending appeal by the Court of Appeals (R. 92).

4. Only the order denying the motion to amend the complaint was appealed (R. 88), so that this was the only action the District Court subjected to the review of the Court of Appeals and protected by the temporary order.

5. The District Court's temporary injunction of June 4 (R. 108, 109) provided:

> "This order restraining and enjoining the issuance of the aforementioned coal mining leases shall remain in effect *until the further order of this Court upon* the disposition of the aforementioned motion for leave to file amended complaint and if the motion for leave is granted then until plaintiff's motion for preliminary injunction is disposed of by the Court, and in the event the motion for leave is granted *then the motion for preliminary injunction shall be further heard within ten days thereafter.*" (Emphasis supplied)

It is obvious that the scope of continuance of an injunction can be no greater than the scope of the injunction continued. It is clear here that the District Court was free to make any "further order" it chose after disposition under the terms of its own injunction which the Court of Appeals continued.

6. Petitioner's argument that the Court of Appeals would attempt to change the scope of the District Court's injunction is manifestly fallacious since the Court of Appeals *continued that very same* injunction. The Court of Appeals' opinion provided:

> "The judgment of the District Court is, therefore, reversed and the case remanded with instruc-

tions to that court *to permit the filing of the proffered amended complaint* and to deny defendant's motion to dismiss *in so far as that motion rests upon the ground that plaintiff has no standing to sue.* The temporary injunction heretofore issued by *the District Court* on June 4, 1948 will be *continued* in effect until final disposition of the action by that court." (Emphasis supplied)

7. It is thus clear that the appeal dealt with amendmen of the complaint and that the Court of Appeals intended to protect its mandate ordering amendment until the amendment had finally been accomplished in accordance with the remand in the District Court. Final disposition of the action could only mean the allowance of the amendment of the complaint, and denial of dismissal on that ground because that was *all* that was under review. After that, the District Court temporary order by its own terms would automatically expire and the terms of the District Court's order would automatically give an additional ten days for further hearing on the question of a preliminary injunction.

In sum, petitioner's confusion is wholly unjustified and, even assuming *arguendo* its justification, his remedy would lie in the Court of Appeals rather than urging a supposed error here which he had not made the slightest effort even to bring to the attention of the Court of Appeals. His defense that to move to clarify the mandate would require excessive time (Pet. Br. 63, footnote 25) compared to seeking relief here, scarcely requires comment. Respondent succeeded in obtaining clarification of the earlier mandate in a few days. (R. 35, 36)

But petitioner's unsupported and erroneous assertion:

"There is *no indication that the district court is seeking to obstruct the appellate jurisdiction of the court below* and respondent has a right of appeal from any order refusing an injunction". (Pet. Br. 59)

does require comment. The District Court appeared almost deliberately obtuse and recalcitrant in refusing to permit amendment of the complaint to conform to the Court of Appeals first opinion, as the Court of Appeals indicated in its second opinion.

> "Upon the appeal, this court agreed with the District Court that merely as a member of the coal industry threatened with a new competitor, Sheridan-Wyoming had no standing to sue, citing *Alabama Power Co.* v. *Ickes* and similar cases. But Sheridan-Wyoming argued that it was a lessee of federal coal land, that the regulation mentioned (43 Code Fed. Regs § 192.3) was part of its lease, and that it thus had a property right threatened wih invasion by the proposed leases to Big Horn, relying upon *Baltimore & Ohio R. R.* v. *United States*[49] and similar cases. As to that contention, this court said:[50]
>
> > " 'The difficulty with the contention in the present case is that no such claim was stated in the complaint. Appellant did not allege in its complaint that it was or is the lessee of federal coal lands or indicate the nature, content or extent of any lease.'
>
> "This court, therefore, refused to consider the contention and affirmed the judgment of the District Court but in the mandate gave that court authority to entertain a motion to amend the complaint. Such a motion was presented, offering an amended complaint which contained an allegation that Sheridan-Wyoming was a lessee of federal coal lands, attaching a copy of the lease, and otherwise alleging the facts concerning the lease theretofore presented in the course of the argument in this court. The District Court denied the motion to amend, saying:
>
> > " 'It is the opinion of this Court that the proposed new matter adds nothing material to the claim and issue presented by plaintiff in its original complaint and, hence, granting leave to amend the complaint by adding the proposed new matter would be idle and would needlessly prolong the litigation.'

[49] 264 U.S. 258, 68 L. Ed. 667, 44 S. Ct. 317 (1924).

[50] *Sheridan Wyoming Coal Co.* v. *Krug*, 83 U.S. App. D.C. ——, 168 F. 2d 557, 558 (1948).

"*It seems to us perfectly clear that the proposed amendment did add something new and material to the claims and issue presented by the plaintiff.* The status of one suing merely as a member of an industry to enjoin threatened competition, and the status of one claiming a property right by contract threatened with invasion, are wholly different.[51] The original complaint in the present case rested on the former status. The amended complaint rested also upon the latter. Moreover, we think this court made clear in its opinion upon the first appeal that plaintiff's rights as a member of the coal industry and its rights as owner of a property right by contract were different. We held that as the former it had no standing to sue. But we pointed out that under the *Baltimore & Ohio* and kindred cases persons claiming protection against threatened invasion of property rights, created by contract upon valid regulations, were entitled to sue.

"It is true that the language in the mandate from this court upon the first appeal was, in part: 'with leave to the District Court to dispose of such motion, if made in such manner as in its discretion seems proper'. It is elementary that a trial court has wide discretion in respect to amendments which are not of right. *But that discretion may be controlled by the opinion of this court, and the discretion mentioned in the mandate was likewise circumscribed by that opinion.* Moreover, such discretion as the trial court had, or was given, *could not deprive this court of its appellate jurisdiction over decisions of that court upon questions of law.* The Supreme Court, in *United States* v. *Lehigh Valley R. R.*,[52] had for consideration a refusal of a trial court to permit an amendment in a matter governed by the opinion of the Supreme Court in a prior appeal. *The Court held the refusal to be 'an absolute abuse of discretion' and expressed the extent of its meaning by adding 'even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.'*

"We now adhere to our original view that plaintiff's status as a lessee of federal coal lands under a lease which incorporated a valid regulation governing such

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[51] *Compare Alabama Power Co.* v. *Ickes*, *supra*, with *Frost* v. *Corporation Commission*, 278 U.S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929).

[52] 220 U.S. 257 (1911).

leases, would be materially different from its status as a mere member of the coal industry. *Since the District Court denied the motion to amend upon a contrary view of that proposition, and upon the contrary view alone, its judgment must be reversed.*" R. 97, 98; emphasis supplied.

See *supra*, "*Before Justice Letts on remand*", (p. 18).

Moreover, the Court of Appeals had twice been forced to consider and then grant restraint pending appeal denied by the District Court by sitting specially and out of normal hours, although it was patent that respondent would lose all remedy the instant restraint lapsed.[53] In the second instance, it was, to say the least strongly indicated to the District Court that the amendment offered should be allowed; and the complaint, so amended, not dismissed on the ground already held erroneous; and restraint continued pending trial of the merits, unless a showing were made of countervailing equities and damage, which of course was not done before Justice Letts. He attempted no reliance on his proper discretion in balancing the equities of restraint, but instead flew in the face of the substantive law on standing to sue as outlined by the Court of Appeals, a field in which he was without discretion.

The reasons supporting the discretionary power of an Appellate Court to grant a stay pending appeal of a difficult question where irreparable injury will occur to plaintiff if the stay is not granted were eloquently put by this Court in *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S 4 at 9-10:

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[53] Once the proposed lease was issued, the Big Horn Coal Company, which was not subject to the service of process in the District of Columbia (Amended Complaint R. 56) would become a necessary party under the doctrine of *Brady* v. *Work*, 263 U.S. 435, because it would have at least a color of right to a lease actually in its possession. This the Court of Appeals knew, since petitioner was below urging that Big Horn was already a necessary party. Of course, until the lease was issued, Big Horn is not a necessary party, as both the District Court and the Court of Appeals decided, on account of the settled rule that no person can mandamus the issuance of a mineral lease of the United States. Petitioner has properly abandoned this contention now.

[2] See *supra*.

"No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. *But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.* It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U.S. 200; *In re McKenzie*, 180 U.S. 536." (Emphasis supplied)

VII. CONCLUSION.

Wherefore, respondent respectfully prays that this Court affirm the judgment of Court of Appeals.

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